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The Entrapment Controversy

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The Entrapment Controversy

Roger Park*

TABLE OF CONTENTS

I. INTRODUCTION	164
II. DESCRIPTION OF CURRENT DOCTRINE	171
A. SUBSTANTIVE DOCTRINE	171
1. <i>The Hypothetical-Person Defense</i>	171
2. <i>The Federal Entrapment Defense</i>	176
3. <i>Federal Quasi-entrapment Defenses</i>	184
a. <i>The due process defense</i>	185
b. <i>The furnishing-contraband defense</i>	190
c. <i>The contingent-fee defense</i>	195
d. <i>The reasonable suspicion defense</i>	196
4. <i>Comparisons</i>	199
B. ADMISSION AND EXCLUSION OF EVIDENCE	200
1. <i>Evidence About Inducement</i>	200
2. <i>Evidence About Predisposition</i>	200
a. <i>The federal defense</i>	200
b. <i>The hypothetical-person defense</i>	201
c. <i>Comparisons</i>	211
III. EVALUATION OF THE HYPOTHETICAL-PERSON DEFENSE	216
A. POTENTIAL DETRIMENTS	216
1. <i>Acquittal of Chronic Offenders</i>	216
2. <i>Conviction of Nondisposed Defendants</i>	217
3. <i>Inaccuracy in Fact-finding</i>	221
B. POTENTIAL BENEFITS	224
1. <i>Protecting Judicial Purity</i>	224
2. <i>Preventing Police Misconduct</i>	225
a. <i>Feasibility of prevention</i>	225
b. <i>Goals of prevention</i>	234
c. <i>Need for prevention</i>	237
IV. AN APOLOGIA FOR THE FEDERAL DEFENSE	240
A. THE PRIVATE-PERSON EXCEPTION	240
B. OBSCURITY AND CONFUSION	243
C. "FICTIONAL" LEGISLATIVE INTENT	246
D. ADMISSION OF HEARSAY	247
E. ADMISSION OF EVIDENCE OF OTHER CRIMES	255
V. PROCEDURAL ISSUES	262
A. BURDEN OF PROOF	262
B. FUNCTION OF JUDGE AND JURY	268
VI. SUMMARY AND CONCLUSION	270

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I. INTRODUCTION

Consensual crimes are unusually difficult to detect, since the forbidden acts take place in private and none of the participants is likely to complain. To expose such crimes, police have had to resort to the use of informers and undercover officers. Often, these agents will solicit the commission of a criminal act for purposes of prosecution. For example, agents offer to purchase drugs from suspected narcotics dealers in order to gather evidence of guilt.

Some solicitations are innocuous. An agent who merely asks for a drink in a speakeasy creates no danger of corrupting the innocent. However, because persons engaged in criminal enterprises are wary of strangers, police usually must do more than simply approach a target and request the commission of a crime. They must work through an informer trusted by the target, or have an undercover officer cultivate the target's trust. Moreover, it may be necessary to make multiple requests before the target agrees to commit the crime solicited.

When agents do more than make a single arms-length request, they create a danger of inducing crimes by persons not already engaged in criminal enterprise. For example, an agent who has formed a close relationship with a drug user may, by appealing to friendship, be able to persuade him to sell drugs even though he has never previously done so. The danger increases if the agent also offers windfall profits, plays on the target's sympathy (as by pretending withdrawal symptoms), or provides assistance that facilitates the crime (as by giving the target drugs to sell to another agent).

Because of concern about the dangers created by police solicitation of crime, almost every American jurisdiction has made the defense of entrapment available to criminal defendants. The defense has won acceptance in the federal courts and in every state except Tennessee.¹ However, agreement that a defense by

1. By 1955, 43 of the 48 states had expressly accepted the entrapment defense; two had expressly rejected it. See Comment, *The Doctrine of Entrapment and Its Application in Texas*, 9 Sw. L.J. 456, 465 n.44 (1955), for a state-by-state tally of cases in these states. The three uncommitted states—Vermont, Delaware, and New Mexico—have since endorsed the defense. See *State v. Girouard*, 130 Vt. 575, 298 A.2d 560 (1972); DEL. CODE ANN. tit. 11, § 432 (1975); *State v. Sainz*, 84 N.M.

this name should be recognized has not been accompanied by consensus about what its elements should be.

Two opposing versions of the entrapment defense have received substantial authoritative support. The first, usually labeled the "subjective"² approach, focuses upon the culpability of the particular defendant, asking whether he was predisposed to commit crimes of the nature charged. If he was ready and willing to commit the offense at any favorable opportunity, then the entrapment defense will fail even if a police agent used an unduly persuasive inducement.³

The other version of the defense, which I will call the "hypo-

259, 501 P.2d 1247 (Ct. App. 1972). Alaska and Hawaii, which became states after 1955, have also recognized the defense. See notes 14, 16 *infra*.

New York, one of the states which previously rejected the defense, has now enacted it by statute. See N.Y. PENAL LAW § 40.05 (McKinney 1975). Tennessee is the remaining holdout. In *Roden v. State*, 209 Tenn. 202, 352 S.W.2d 227, 228 (1961), the court noted that it had "held consistently and repeatedly that entrapment is not a defense in Tennessee," although it went on to demonstrate that under the facts before it no entrapment had occurred.

TENN. CRIM. CODE & CODE OF CRIM. PRO. § 39-605 (Proposed Final Draft, 1973), now pending before the General Assembly, would establish a defense of entrapment based upon the Model Penal Code.

2. The words "subjective" and "objective" are commonly used labels for the two standard formulations of the entrapment doctrine. The words are meant to refer to the circumstance that the "objective" approach considers whether the conduct of police agents would have tempted a hypothetical person, while the "subjective" approach considers whether the defendant himself was led astray by the government's conduct. However, the terms create a risk of confusion:

(1) The terms have occasionally been used in a fashion which suggests that the "subjective" approach leaves greater room for interposition of personal value judgments. See, e.g., Note, *The Entrapment Defense in Kansas: Subjectivity Versus an Objective Standard*, 12 WASHBURN L.J. 64 (1972). The "objective" focus upon the morality of police conduct leaves just as much room for subjective value judgments as does the "subjective" focus upon the defendant's state of mind.

(2) The word "objective" has often been used to describe standards of criminal or tort liability that evaluate the defendant's behavior by comparing it to that of a reasonable person. See, e.g., Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927). The "objective" entrapment test does not compare the defendant's conduct to that of a reasonable person; it evaluates the *agent's* conduct by considering its probable impact upon a hypothetical law-abiding person. See text accompanying notes 21-33 *infra*.

In an attempt to avoid confusion, I have referred to the "subjective" test as the "federal defense" except where that usage would be inappropriate. I have referred to the "objective" approach as the "hypothetical-person" defense.

3. See *United States v. Russell*, 411 U.S. 423 (1973), and the standard jury instruction quoted in note 39 *infra*.

thetical-person" approach,⁴ focuses upon the inducements used by police agents. If an agent used inducements likely to cause a nondisposed person to commit the crime charged, then the fact that the particular defendant was ready and willing to commit it will not defeat the entrapment defense.⁵ Proponents of this approach hope to deter police misconduct, and to keep the criminal justice system from being soiled by unworthy action.⁶

Supreme Court Justices have been the oracles of both theories of entrapment. In two leading cases decided in 1932 and 1958—*Sorrells v. United States*⁷ and *Sherman v. United States*⁸—the Court endorsed the subjective defense. However, articulate minorities, led by Justices Roberts and Frankfurter respectively, urged a version that would focus solely on the issue of whether police conduct had fallen below proper standards.⁹ In the 1973 case of *United States v. Russell*,¹⁰ a sharply divided Court declined to depart from the doctrine established in *Sorrells* and *Sherman*; four dissenters reiterated the views expressed by the earlier minorities.¹¹

In 1962, the American Law Institute endorsed the minority view by placing a hypothetical-person definition of entrapment in its Model Penal Code.¹² However, despite support by an

4. This version of the defense is often called the "objective" or "police conduct" approach. I have refrained from using the term "objective" in hopes of avoiding confusion. See note 2 *supra*. I have avoided the label "police conduct" because it suggests that by grounding the entrapment defense upon distaste for police misconduct rather than upon the theory that the defendant is not sufficiently culpable, a court must necessarily reject the "subjective" approach. Supporters of the "subjective" test may reasonably base the defense upon a "police conduct" rationale. See *People v. Benford*, 53 Cal. 2d 1, 8-9, 345 P.2d 928, 934 (1959). *Benford* endorses the "subjective" test but is sometimes cited as an "objective" decision because of its statement that "[e]ntrapment is a defense not because the defendant is innocent but because . . . 'it is a less [sic] evil that some criminals should escape than that the Government should play an ignoble part.'" See also text at 240-43 *infra*.

5. For typical formulations of the hypothetical-person defense, see note 17 *infra* and text accompanying notes 22-28 *infra*.

6. See text accompanying notes 202-08 *infra*.

7. 287 U.S. 435 (1932).

8. 356 U.S. 369 (1958).

9. See *Sherman v. United States*, 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring); *Sorrells v. United States*, 287 U.S. 435, 453-59 (1932) (Roberts, J., concurring).

10. 411 U.S. 423 (1973).

11. See *United States v. Russell*, 411 U.S. 423, 436-39 (1973) (Douglas, J., dissenting); *id.* at 439-50 (Stewart, J., dissenting).

12. MODEL PENAL CODE § 2.13 (Official Draft, 1962). For the text of this section, see note 17 *infra*.

overwhelming majority of commentators,¹³ the hypothetical-person defense did not achieve authoritative acceptance in any jurisdiction until Alaska adopted it by judicial decision in 1969.¹⁴ Since then, two other state supreme courts have fol-

13. Impressive commentary supporting the hypothetical-person approach may be found in L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, *DETECTION OF CRIME* 265-72 (1967) (report on police practices sponsored by the American Bar Foundation) [hereinafter cited as TIFFANY]; 1 U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, *WORKING PAPERS* 320 (1970) [hereinafter cited as BROWN COMMISSION COMMENTARY]; and Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 *YALE L. J.* 1091 (1951) [hereinafter cited as Donnelly]. Other supporters include Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 *YALE L.J.* 683, 687-90 (1975); McLean, *Informers and Agent Provocateurs*, 1969 *CRIM. L. REV.* (London) 527; Sagarin & MacNamara, *The Problem of Entrapment*, 16 *CRIME & DELIN.* 363 (1970); Schecter, *Police Procedure and the Accusatorial Principle*, 3 *CRIM. L. BULL.* 521 (1967); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 *FORDHAM L. REV.* 399 (1959). Cf. W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 371 (1971).

It appears that only one law review article in the past 25 years has favored the subjective approach to entrapment. See Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 *U. SAN FRAN. L. REV.* 243 (1967). Mr. Defeo would prefer to abolish the entrapment defense completely, but recognizes that it is firmly embedded in American law. He finds the subjective approach to be the lesser of two evils because under it "the present relatively narrow coverage of the defense would not be appreciably expanded." *Id.* at 275.

In the same period, over 100 student notes and case comments were written on the subject of entrapment. Partial examination of this commentary indicates that it overwhelmingly favors the hypothetical-person approach. See, e.g., Comment, *Entrapment—Predisposition of Defendant Crucial Factor in Entrapment Defense*, 59 *CORNELL L. REV.* 546 (1974); Comment, *Entrapment: A Critical Discussion*, 37 *MO. L. REV.* 633 (1972); Comment, *Entrapment by Federal Officers*, 33 *N.Y.U.L. REV.* 1033 (1958); Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 *U. CHI. L. REV.* 137, 170 (1963); Comment, *Entrapment in the Federal Courts*, 1 *U. SAN FRAN. L. REV.* 177 (1966); cf. Note, *"The Serpent Beguiled Me and I Did Eat"—The Constitutional Status of the Entrapment Defense*, 74 *YALE L.J.* 942 (1965). On the other hand, see Note, *Entrapment*, 73 *HARV. L. REV.* 1332 (1960), and Note, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons*, 49 *J. CRIM. L.C. & P.S.* 447 (1959), which favor modified versions of the subjective approach.

The fact that scholarly opinion favors the hypothetical-person test is reflected in the opinions in *United States v. Russell*, 411 U.S. 423 (1973). The majority opinion relied solely upon case law authority. Justice Stewart's dissenting opinion claimed the support of a majority of commentators, citing the Model Penal Code, the Brown Commission proposal (note 17 *infra*), and three law review pieces. See *id.* at 445 n.3 (dissenting opinion).

14. *Grossman v. State*, 457 P.2d 226 (Alas. 1969). A few lower federal court cases prior to *Grossman* seemed to favor the hypothetical-per-

lowed suit,¹⁵ and at least four other states have adopted it by statute.¹⁶ These cases and statutes have invariably formulated the defense in language similar to that contained in the ALI's

son test. See *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated in light of Russell*, 412 U.S. 936 (1973), *conviction aff'd*, 494 F.2d 562 (7th Cir. 1974); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970); *United States v. Dillet*, 265 F. Supp. 980 (S.D.N.Y. 1966). However, these cases were not consistent with the doctrine expounded by the Supreme Court.

15. *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974) (adopts Brown Commission proposal quoted in note 17 *infra*); *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973).

16. N.D. CENT. CODE § 12.1-05-11 (Spec. Supp. 1975) (verbatim copy, except for immaterial changes in third paragraph, of Brown Commission proposal); 5 N.H. REV. STAT. ANN. § 626:5 (Supp. 1973) (based on Model Penal Code); Hawaii Sess. Laws 1972, act 9, § 237 (verbatim copy of Model Penal Code's substantive definition of entrapment).

State courts have displayed a remarkable tendency to construe statutes based upon the Model Penal Code as codifications of the subjective approach. For example, Pennsylvania has enacted a statute that is a verbatim copy of the Model Penal Code provision, except for omission of the requirement that the defense be tried by the judge. See PA. STAT. ANN. tit. 18, § 313 (1973). However, an intermediate appellate court in Pennsylvania, construing the statute, has stated that "the prerequisites to allowing an entrapment defense are dual: a defendant not disposed to commit the crime *and* police conduct which may ensnare the innocent victim." *Commonwealth v. Mott*, 234 Pa. Super. 52, 334 A.2d 771, 773 (1975) (emphasis in original). Perhaps the derivation of the statute was not called to the court's attention.

In UTAH CODE ANN. § 76-2-303 (Supp. 1975), entrapment is defined as use of methods "creating a substantial risk that the offense would be committed by one not otherwise ready to commit it." This statute seems to establish a hypothetical-person test (it refers to the "risk" of seducing an innocent person, rather than whether an innocent person was in fact seduced), but the Supreme Court of Utah recently reiterated its adherence to the subjective test despite the statute. See *State v. Curtis*, 542 P.2d 744, 747 (Utah 1975). A strong dissent by Justice Maughan pointed out that the statute was based on the Model Penal Code and argued that it should be construed accordingly. *Id.* at 747-53.

The highest court of New York State has also interpreted a statute that was apparently based on the Model Penal Code as establishing a subjective test in which predisposition is a dispositive fact. *People v. Calvano*, 30 N.Y.2d 199, 282 N.E.2d 322, 331 N.Y.S.2d 344 (1972); *accord*, *People v. Mann*, 31 N.Y.2d 253, 288 N.E.2d 295, 336 N.Y.S.2d 633 (1972). The *Calvano* case construed a statute that defined entrapment as use of methods which "were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it." N.Y. PENAL LAW § 40.05 (McKinney 1975). The statute's language is very similar to the Model Penal Code's definition of entrapment as use of methods of persuasion or inducement which "created a substantial risk that such an offense would be committed by persons other than those who are ready to commit it." MODEL PENAL CODE § 2.13(1)(6) (Official Draft, 1962). In *State v. Bacon*, 114 N.H. 306, 319 A.2d 636 (1974), the New Hampshire supreme court construed a statute

Model Penal Code or the new federal code proposed by the Brown Commission.¹⁷

that defined entrapment in the same words used by the New York statute, 5 N.H. REV. STAT. ANN. § 626:5 (Supp. 1973), to establish a hypothetical-person test, and this construction seems preferable.

COLO. REV. STAT. ANN. § 18-1-709 (Supp. 1973) defines entrapment as use of methods "such as to create a substantial risk that the acts would be committed by a person who, but for such inducement, would not have conceived of or engaged in conduct of the sort induced." Although Colorado's statute is phrased in language which suggests a hypothetical-person test, it may have been intended to codify the subjective test, in view of the Revisor's comment that "[t]his is codification of well established case law" and the comment's citation of *Gonzales v. People*, 168 Colo. 545, 452 P.2d 46 (1969), a case following the traditional subjective approach.

TEX. PENAL CODE ANN. § 8.06(a) (1975) defines entrapment as "using persuasion or other means likely to cause persons to commit the offense." There is uncertainty about whether the statute will be interpreted to establish a hypothetical-person test. For a useful discussion of this statute, see Hardy, *The Traps of Entrapment*, 3 AM. J. CRIM. LAW 165, 192-202 (1974).

17. See MODEL PENAL CODE § 2.13 (Official Draft, 1962); U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (1971) [hereinafter cited as BROWN COMMISSION PROPOSAL]. Section 2.13 of the Model Penal Code provides that

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

Section 702(2) of the Brown Commission proposal provides that

[e]ntrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The Brown Commission proposal was modeled on the Model Penal Code, but the language of the latter was "altered somewhat to insure that an objective standard is employed to determine whether police conduct is sufficiently unsavory to justify an entrapment defense." BROWN COMMISSION COMMENTARY, *supra* note 13, at 320.

This Article will evaluate the federal defense and the hypothetical-person defense. Although these versions of the defense do not exhaust the universe of possible alternatives,¹⁸ they do seem to be the ones most likely to receive authoritative support. Therefore, it seems worthwhile to ask which of these two orthodox formulations is more desirable.

My thesis is that the federal defense, with some modifications, is preferable to the hypothetical-person defense. I will begin with a description of the two defenses, with emphasis upon how they deal with predisposition and agent misconduct. On the basis of this description, I will argue that the hypothetical-person defense creates a greater risk of unjust treatment of individual defendants than does the federal defense, and that the possibility of beneficial effects upon conduct of police agents is not strong enough to justify taking this risk.

I will also respond to various criticisms of the federal test. Commentators have repeatedly argued that it is based on a fictitious view of legislative intent; that it is confusing and obscure; that its emphasis upon the "innocence" of the defendant is inconsistent with the rule that entrapment by a private person is no excuse; and that it allows the introduction of unreliable and prejudicial evidence. Most of these criticisms have not been answered. Academic commentary has lopsidedly favored the hypothetical-person approach,¹⁹ and judicial opinions supporting the

The sponsors of Senate Bill S. 1 (the proposed Criminal Justice Reform Act of 1975) rejected the Brown Commission proposal in favor of a codified version of the subjective approach. See S. 1, 94th Cong., 1st Sess. § 551 (1975).

18. For examples of other proposals, see *Hearings on the National Comm'n on Reform of Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 12, pt. 3B, at 1443-44 (1971) (testimony of the American Civil Liberties Union) (advocates alternative subjective and hypothetical-person defenses supplemented by requirement that police have reasonable suspicion before offering inducement); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 406-09, 416-17 (1974) (recommends that courts require legislation or police rules governing police spying); Note, *supra* note 13, 74 YALE L.J. at 952 (arguing that fourth amendment requires that police have reasonable cause to solicit crime); Comment, *supra* note 13, 31 U. CHI. L. REV. at 178 (advocates alternative hypothetical-person and reasonable-cause-to-solicit defenses). See note 239 *infra* (reasonable suspicion defense).

For a discussion of the question whether it would be desirable to combine a hypothetical-person defense with a subjective defense, see text at 273-74.

19. See note 13 *supra*.

federal test have avoided many of the issues raised by scholars.²⁰

Finally, I will discuss how the burden of proof should be allocated, and whether the defense should be the province of the judge or of the jury. I have placed this discussion toward the end of the Article because resolution of these procedural issues depends largely upon one's views about the substantive issues.

At the close of the Article I have placed a summary of its principal themes and conclusions.

II. DESCRIPTION OF CURRENT DOCTRINE

The federal defense and the hypothetical-person defense differ both in substantive definition of entrapment and in ancillary rules about the admissibility of evidence. This section describes those differences. Subsequent sections will evaluate the comparative merits of the two defenses.

A. SUBSTANTIVE DOCTRINE

1. *The Hypothetical-Person Defense*

Under the hypothetical-person defense, the issue of whether an agent²¹ used an improper inducement is dispositive. If an agent caused the commission of an offense with an improper in-

20. For example, none of the Supreme Court's majority opinions attempt to meet the argument that the rationale of the subjective approach is inconsistent with the rule that entrapment by a private person is no excuse or to deal seriously with the argument that the subjective approach is based on a fictitious view of legislative intent. Justice Rehnquist's majority opinion in *Russell* merely notes that "[a]rguments such as these, while not devoid of appeal, have been twice previously made to this Court, and twice rejected by it, first in *Sorrells* and then in *Sherman*." *United States v. Russell*, 411 U.S. 423, 433-434 (1973).

21. In this Article, the term "agent" refers to (1) personnel of law enforcement agencies and (2) persons who are cooperating with law enforcement agencies, including persons charged with crime who are cooperating in hopes of obtaining leniency. Such persons are universally considered to be government agents for purposes of the entrapment defense. See, e.g., *Sherman v. United States*, 356 U.S. 369 (1958); MODEL PENAL CODE § 2.13(1) (Official Draft, 1962); BROWN COMMISSION PROPOSAL, *supra* note 17, § 702(3).

When the term "informer" is used in this Article, it refers to an agent who is a cooperating private person. When the term "officer" is used, it refers to an agent who is a regularly employed law enforcement official.

ducement, the defendant must be acquitted; if the inducement was proper, he must be convicted.²²

The propriety of the inducement is determined by its probable effect upon a hypothetical person. Under the Model Penal Code, inducements are improper if they "create a substantial risk that [the] offense will be committed by persons other than those who are ready to commit it."²³ Under the Brown Commission proposal, they are improper if "likely to cause normally law-abiding persons to commit the offense."²⁴ Most of the hypothetical-person jurisdictions have adopted one of these two formulations.²⁵ However, the leading case of *Grossman v. State*²⁶ phrased the test somewhat differently, indicating that an inducement would be improper if it "would be effective to persuade an average person" to commit the offense.

Although these three formulations of the defense all use the concept of a hypothetical person, they may differ in the strength of character with which the hypothetical person is endowed.

If *Grossman* means that inducements are prohibited only if they would actually cause an *average* person to commit an offense, then the coverage of its entrapment defense is very limited. The average person may occasionally commit a petty offense, but

22. See, e.g., MODEL PENAL CODE § 2.13 & Comment at 19 (Tent. Draft No. 9, 1959); BROWN COMMISSION PROPOSAL, *supra* note 17, § 702(2) & COMMENTARY, *supra* note 13, at 320-21; *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974).

23. MODEL PENAL CODE § 2.13(1) (Official Draft, 1962) (quoted in note 17 *supra*).

24. BROWN COMMISSION PROPOSAL, *supra* note 17, § 702(2) (quoted in note 17 *supra*).

25. See cases and statutes cited in notes 14-16 *supra*.

26. 457 P.2d 226, 229 (Alas. 1969). The full text of the paragraph in which the quoted words appear reads as follows:

The objective test can be stated as follows: unlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense. Conversely, instigations which would induce only a person engaged in an habitual course of unlawful conduct for gain or profit do not constitute entrapment.

Many inducements will fall between the two extremes described in the first and second sentences of the quoted paragraph. It is not clear how the *Grossman* court would deal with such inducements. However, in a footnote to the quoted paragraph, the court stated that it intended to permit police activity which would tempt "situational" as well as "chronic" offenders. *Id.* n.9. This statement suggests that it did intend to create a test that would require the target to exercise substantial self-control.

he will not commit a serious crime unless he is severely pressed. The man on the Clapham omnibus would not sell heroin even if he were offered inducements that would be quite tempting to a member of the drug culture. A test actually based upon the proclivities of the average person would rob the entrapment defense of any significance in cases involving serious or unusual offenses.

The Model Penal Code seems more lenient. Its hypothetical person is described as someone who is not "ready" to commit the offense. This language can be construed to prohibit inducements likely to seduce a person who, though possessing a greater than average weakness for the crime solicited, would resist ordinary temptations to commit it.²⁷

The Brown Commission proposal is susceptible to a similar construction, since a "normally law-abiding person" could be someone who, though usually law-abiding, has a weakness for a particular crime. However, the Commission commentary equates "normally law-abiding" with "average law-abiding," and rejects the idea that the inducement should be judged in terms of its probable effect upon a person who was susceptible but not already disposed to commit the crime.²⁸

It seems unlikely that the "average person" language in *Grossman v. State* and the Brown Commission commentary was really intended to endow the hypothetical person with the

27. The Model Penal Code provision is essentially a codification and elaboration of Justice Frankfurter's influential minority opinion in *Sherman*. Frankfurter's opinion contains language which indicates that he would have favored an approach which would have prohibited inducements likely to cause crime by law-abiding but ductile persons:

This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. . . . It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations.

Sherman v. United States, 356 U.S. 269, 383-84 (1958) (Frankfurter, J., concurring).

28. The Brown Commission commentary includes the following: The proposed California entrapment statute is said by its draftsmen to be based on the propensities of those "who are susceptible but not already disposed at the time of the event, rather than at the citizen of strong law-abiding habits." *This rather particularized standard is eschewed here in favor of one patterned after the oft-encountered reasonable man.*

BROWN COMMISSION COMMENTARY, *supra* note 13, at 321 (emphasis added).

strength of character possessed by an average person. Such an interpretation would seem to require conviction even in *Sherman v. United States*,²⁹ where all of the Justices agreed that entrapment had been conclusively established. The defendant in *Sherman* was an addict who, while undergoing treatment in an attempt to cure his addiction, was lured into selling heroin by a police agent. The inducements offered were extremely tempting to an addict, but would not have caused an average person to commit the offense. However, both *Grossman* and the Brown Commission commentary endorse Justice Frankfurter's concurring opinion in *Sherman*, which expressed the view that the agent's conduct constituted entrapment as a matter of law.³⁰ Against this background, it is difficult to know what to make of the "average person" language. Perhaps it should be viewed as a warning that inducements will not be condemned merely because they require the target to exercise a substantial amount of self-control. The *Grossman* court seems to have had something of this nature in mind. In a footnote to its "average person" definition, it expressly stated that it intended to permit inducements which would tempt both "situational" offenders and "chronic" offenders.³¹

The types of inducements prohibited by the hypothetical-person defense cannot be described with particularity. Some proponents of the defense have expressed blanket disapproval of badgering, appeals to friendship and sympathy, and offers of easy profit.³² However, the case law is still very sparse, so it is too early to know how far courts will go in prohibiting such inducements. Courts in jurisdictions that have adopted the defense have so far been cautious, emphasizing that although such temptations would be impermissible in some instances, each case must be judged on its own facts.³³

Proof that an agent used persuasion which would corrupt the hypothetical person is not, in itself, sufficient to establish en-

29. 356 U.S. 369 (1958).

30. See *Grossman v. State*, 457 P.2d 226, 228-29 (Alas. 1969); BROWN COMMISSION COMMENTARY, *supra* note 13, at 316-17, 322.

31. See *Grossman v. State*, 457 P.2d 226, 229 n.9 (Alas. 1969). The *Grossman* footnote indicates disagreement with the version of the hypothetical-person test proposed in Professor Donnelly's influential article, *supra* note 13. Professor Donnelly distinguished "situational" offenders from "chronic" offenders and stated that "[t]he question should be, Was the officer's (or stool pigeon's) conduct of such a nature that only a chronic violator would be tempted?" *Id.* at 1114.

32. See note 212 *infra*.

33. See note 213 *infra*.

trapment. There must also be a causal connection between the agent's conduct and the defendant's offense. The Model Penal Code provides that a defendant is entitled to acquittal only if he proves that his conduct occurred "in response to" an "entrapment" by an agent.³⁴ Other formulations of the hypothetical-person defense establish a causation requirement by providing that the agent's conduct must be shown to have "induced" the defendant's crime.³⁵

The Brown Commission commentary states that its draftsmen intended to avoid "an investigation of causation." Noting that Justice Roberts's minority opinion in *Sorrells* defined entrapment as the procurement of criminal conduct "by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer," the commentary states:

The difficulty with this analysis is that it tends to shift one's sights from the police conduct involved to the issue as to whether it caused the accused to commit the alleged crime. An investigation of causation, of necessity, must treat the question of the accused's criminal predisposition.³⁶

The quoted language should not be interpreted to mean that the Brown Commission proposal does not require any causal connection between the agent's misconduct and the defendant's offense. Such an interpretation would lead to bizarre results. The Commission could not have intended that an offender be entitled to acquittal because of police conduct completely unrelated to his offense. For example, suppose that an agent used improper methods to try to overcome the suspicion of a heroin dealer, but never succeeded in making a purchase. His conduct should not prevent conviction of the defendant for an unrelated sale to a third person. Yet that would seem to be the result called for by a test which completely discarded any requirement of causal connection.

The Brown Commission statute provides that "[e]ntrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense."³⁷ This lan-

34. MODEL PENAL CODE § 2.13(2) (Official Draft, 1962) (quoted in note 17 *supra*).

35. See *Grossman v. State*, 457 P.2d 226, 229 (Alas. 1969); *State v. Mullen*, 216 N.W.2d 375, 382 (Iowa 1974); N.D. CENT. CODE § 12.1-05-11(2) (Spec. Supp. 1975); N.H. REV. STAT. ANN. § 626.5 (Supp. 1973); BROWN COMMISSION PROPOSAL, *supra* note 17, § 702(2).

36. BROWN COMMISSION COMMENTARY, *supra* note 13, at 320.

37. BROWN COMMISSION PROPOSAL, *supra* note 17, § 702(2).

guage indicates that the Brown Commission proposal does carry a causation requirement. An agent does not "induce" an offense unless he causes it. However, probably all that is needed to satisfy the causation requirement is a showing that the particular offense would not have occurred but for government inducement, regardless of whether the overreaching aspect of the agent's conduct may be said to have caused the offense.

2. *The Federal Entrapment Defense*

Two issues arise in federal entrapment cases: (1) whether the defendant was predisposed to commit the type of offense charged, and (2) whether the offense charged was induced by a government agent.³⁸

A defendant is considered to have been predisposed if he was ready and willing to commit the type of crime charged whenever presented with a favorable opportunity.³⁹ He can be predisposed

38. See *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952). (This case reversed Sherman's conviction and ordered a new trial. The second trial led to a conviction that was affirmed by the court of appeals, *United States v. Sherman*, 240 F.2d 949 (2d Cir. 1957), and reversed by the Supreme Court, *Sherman v. United States*, 356 U.S. 369 (1958).)

39. The following jury instruction, from 1 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 13.13, at 290-91 (2d ed. 1970), contains a typical definition of predisposition:

The defendant asserts that he was a victim of entrapment as to the crime charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the Government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or per-

to commit a crime even if he did not form an intent to commit the specific criminal act charged until it was solicited by an agent.⁴⁰ For example, a regular dealer of heroin would be considered predisposed to commit the crime of selling heroin even if the idea of consummating the particular sale for which he was indicted originated with a government agent.

A defendant's predisposition must relate to crimes of the nature charged; it is not sufficient that he was ready and willing to commit dissimilar crimes.⁴¹ Moreover, the fact that the de-

suaded by some officer or agent of the Government, then it is your duty to acquit him.

The foregoing instruction has received widespread acceptance in the federal courts. See, e.g., *United States v. Gardner*, 516 F.2d 334, 347-48 (7th Cir.), *cert. denied*, 96 S. Ct. 118 (1975) ("the district courts should in the future be guided by the instruction on entrapment found in *E. Devitt & C. Blackmar*"); *United States v. Penz-Ozuna*, 511 F.2d 1106 (9th Cir. 1975) (trial judge's use of *Devitt & Blackmar* instruction sustained on appeal); *United States v. Watson*, 489 F.2d 504, 506 (3d Cir. 1973) ("The first five paragraphs of the [trial court's] charge conform to the suggested language in 1 *E. Devitt & C. Blackmar* . . . which we [have] approved."); *United States v. Pollard*, 483 F.2d 929, 932 (8th Cir. 1973), *cert. denied*, 414 U.S. 1137 (1974) ("The entrapment instruction included in the court's charge in this case can be found in *Devitt & Blackmar* . . . and has been approved by this court time and time again."); *Government of the Virgin Islands v. Cruz*, 478 F.2d 712, 717 n.5 (3d Cir. 1973); *United States v. Abbadessa*, 470 F.2d 1333, 1338 n.5 (10th Cir. 1972) (approving instruction identical in relevant respects). See also cases cited in 1 *E. DEVITT & C. BLACKMAR*, *supra*, § 13.13 (1970, Supp. 1974).

In *United States v. Russell*, 411 U.S. 423, 427 n.4 (1973), the Supreme Court quoted parts of the *Devitt & Blackmar* instruction and noted that the district judge had given the "standard entrapment instruction." The instruction given by the district judge in *Russell* was identical to the instruction quoted above in all material respects except for the omission of the narcotics example given in the fourth sentence. See Appendix to Brief of the United States at 17-18, *United States v. Russell*, 411 U.S. 423 (1973).

(The authors of the quoted instruction made a minor change in the final paragraph in 1974. See 1 *E. DEVITT & C. BLACKMAR*, *supra*, § 13.13' (Supp. 1974).)

40. See, e.g., *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952). See also instruction quoted in note 39 *supra*; *United States v. Watson*, 489 F.2d 504, 506 (3d Cir. 1973); *United States v. Pollard*, 483 F.2d 929 (8th Cir. 1973), *cert. denied*, 414 U.S. 1137 (1974); *Dix, Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 254-55 (1975).

41. See, e.g., *Carbajal-Portillo v. United States*, 396 F.2d 944 (9th Cir. 1968); *DeJong v. United States*, 381 F.2d 725 (9th Cir. 1967); *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (dictum). Note that the standard instruction, note 39 *supra*, requires the jury to find that the defendant was ready and willing to commit crimes "such as charged in the indictment" before it can determine that he was predisposed.

fendant failed to exhibit the amount of control possessed by the average person does not necessarily mean that he was predisposed. Personal weaknesses (such as a proclivity for drug use) that made him more susceptible to temptation than the average person do not constitute predisposition unless the defendant's self-control was so slight that he was ready and willing to commit the crime at any favorable opportunity.⁴²

The federal courts have avoided further particularization of the definition of predisposition by treating entrapment as a quintessential jury issue. The defense is easy to raise⁴³ and supremely difficult to establish as a matter of law.⁴⁴ Jurors are given general instructions to the effect that the issue is whether the defendant was ready and willing;⁴⁵ and on this issue they both

42. See, e.g., *Sherman v. United States*, 356 U.S. 369 (1958); instruction quoted in note 39 *supra*.

43. See text accompanying notes 48-59 *infra*.

44. Of 405 reported federal entrapment decisions in a five-year period beginning January 1, 1970, 27 involved reversals or acquittals because of entrapment-related error. Only two of these cases involved a determination that entrapment had been established as a matter of law. The remainder were reversals for refusal to instruct, erroneous instructions, exclusion of entrapment-related evidence, or other reversals entitling the government to another trial. (For a description of the means by which this data was gathered, see note 223 *infra*.)

One reason why it may be difficult to establish entrapment as a matter of law is that the facts are rarely undisputed. There is usually a divergence between the agents' testimony and the defendant's. Even when the defendant's testimony is not directly contradicted, cases are normally permitted to go to the jury on the theory that it is entitled to disbelieve him. See *Masciale v. United States*, 356 U.S. 386 (1958) (informer did not testify; jury entitled to disbelieve defendant's entrapment story); *United States v. Jett*, 491 F.2d 1078 (1st Cir. 1974). But see *United States v. West*, 511 F.2d 1083 (3d Cir. 1975) (*held*, defendant's uncontradicted testimony must be accepted; *Masciale* distinguished on ground that in *Masciale* the defendant's conduct when dealing with other agents provided support for an inference that he was not testifying truthfully about dealings with informer).

In one of the leading Supreme Court cases, *Sherman v. United States*, 356 U.S. 369 (1950), the Court did hold that entrapment had been established as a matter of law. This result was made possible by the fact that the testimony of the government informer who had induced the crime provided grounds for a determination of entrapment.

45. For a widely used instruction see note 39 *supra*.

The author's review of federal case law indicates that trial judges have rarely attempted to give binding instructions to the jury explaining what results it should reach under alternative assumptions of fact. Appeals claiming that instructions were erroneous have usually involved an attack on one of the general form-book instructions instead of an attack upon binding instructions tailored to the facts of a particular case. See, e.g., *United States v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 96 S. Ct. 118 (1975) (disapproving of the instruction carried in *W. LABUY, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES* § 6.12 (1965); favoring

interpret the legal standard and determine the facts. Judicial opinions rarely contain descriptions of particular circumstances that would constitute entrapment as a matter of law.

The other element of the federal defense, government inducement, requires at a minimum that the crime be attended by the intervention of a government official or of a person acting in cooperation with a government official. A defendant who was seduced by a private temptor is not entitled to acquittal.⁴⁶

There is a division of opinion about whether government inducement occurs when an agent merely solicits the commission of an offense, or whether something more is required, such as use of persuasion, badgering, or pressure. The Brown Commission commentary, in describing the federal defense, states that inducement means overreaching government conduct:

The defense of entrapment, as defined in Chief Justice Hughes' [majority] opinion [in *Sorrells v. United States*]. . . . seeks to determine whether it was the strength and persistence of the government's urging or the accused's own pre-existing criminal intention which gave rise to the commission of the conduct constituting an offense. The defense has, therefore, come to require both that: (a) the government has engaged in activities beyond the reasonable limits of those artifices or stratagems necessary to produce evidence of criminality, and that (b) the accused was not predisposed in fact or by reason of his past conduct to engage in the prohibited conduct. These twin elements of *inducement* and *predisposition*, when conjoined, form the presently recognized basis for the entrapment defense.⁴⁷

the instruction described in note 39 *supra*); cases cited in note 39 *supra*.

46. See note 254 *infra* and accompanying text.

47. BROWN COMMISSION COMMENTARY, *supra* note 13, at 306. However, the commentary, at 321, also states:

It is recognized that this objective test [proposed by the Commission] may work injustice in particular cases. . . . [P]ersons who were not predisposed to commit crime may be convicted when the police conduct is not so offensive as to violate the statutory standard for entrapment.

Apparently the Commission either is not referring to the federal test in the second sentence quoted above, or it views the degree of offensiveness required for acquittal under its proposal as higher than the "activities beyond the reasonable limits of those artifices or stratagems necessary to produce evidence of criminality" which it describes as being necessary for acquittal under the federal test.

The Model Penal Code commentary indicates that its authors did not believe that the federal test required a showing of improper inducement. Tentative Draft No. 9 of the Model Penal Code proposed a test based on the federal case law, offering as an alternative the version ultimately approved by the Institute. Its commentary noted that "[u]nder the main formulation [federal approach], A's mere offer to purchase narcotics from D may give rise to the defense provided D is not predisposed to sell. A contrary result is reached under the alternative. A mere offer

The foregoing passage exaggerates the requirements of the federal defense. The federal case law indicates that the element of "inducement" can be established without any showing that an agent "engaged in activities beyond the reasonable limits of those artifices or stratagems necessary to produce evidence of criminality."

Since the defendant has the burden of production on the issue of inducement,⁴⁸ appellate courts have frequently had occasion to define "inducement" in opinions describing the evidence which the defendant must produce in order to present an issue for jury consideration. Several have held that the defendant may satisfy his burden on inducement without producing any evidence that the government agent used persuasion or pressure. In an influential opinion, Judge Learned Hand defined "inducement" as merely a "soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged."⁴⁹ Others have stated that the defendant may satisfy his burden by bringing forward evidence that the government initiated the crime, regardless of the amount of pressure applied to the defendant.⁵⁰

These decisions do not mean that a defendant is entitled to entrapment instructions even if uncontradicted testimony establishes beyond any doubt that he was eager to commit the crime.

to buy hardly creates a serious risk of offending by the innocent." MODEL PENAL CODE § 2.13, Comment at 19 (Tent. Draft No. 9, 1959).

48. See text accompanying notes 325-30 *infra*.

49. *United States v. Sherman*, 200 F.2d 880, 883 (2d Cir. 1952).

50. *United States v. Licursi*, 525 F.2d 1164, 1168 (2d Cir. 1975) (element of inducement involves only "the Government's initiation of the crime and not . . . the degree of pressure exerted"); *United States v. Armocida*, 515 F.2d 49, 55 (3d Cir. 1975); *United States v. Watson*, 489 F.2d 504, 509 (3d Cir. 1973) (burden of production on inducement satisfied by "evidence that the Government initiated the crime, regardless of the amount of pressure applied to the defendant"); *United States v. Johnson*, 371 F.2d 800, 803 (3d Cir. 1967) (quoting Judge Hand's definition of "inducement"); *United States v. Riley*, 363 F.2d 955, 958-59 (2d Cir. 1966) (Friendly, J.); *United States v. Jones*, 360 F.2d 92, 96 (2d Cir. 1966), *cert. denied*, 385 U.S. 1012 (1967); *United States v. Pugliese*, 346 F.2d 861, 863 (2d Cir. 1965). The First Circuit has reached essentially the same result. See *Kadis v. United States*, 373 F.2d 370, 372 & n.2, 373-74 (1st Cir. 1967); *Sagansky v. United States*, 358 F.2d 195 (1st Cir.), *cert. denied*, 385 U.S. 816 (1966). *Kadis* could be read to hold that the defendant does not even have a burden of production on the issue of inducement, since it states that "consideration of inducement as a separate issue serves no useful purpose." 373 F.2d at 373. However, it seems doubtful that the *Kadis* court meant to require entrapment instructions in cases where there is no evidence that a government agent solicited, encouraged, or participated in the criminal act. Such instructions would serve no purpose; entrapment is not a defense unless the alleged entraper was a government agent. See note 254 *infra* and accompanying text.

Courts that have defined "inducement" as mere initiation have supplemented the defendant's burden of production on the inducement issue with the requirement that he produce some evidence negating his propensity to commit the crime.⁵¹ The focus has thus been placed on the issue of predisposition rather than on the issue of whether the police conduct was reasonable.⁵²

The view that the defendant can satisfy his burden on inducement merely by producing evidence that an agent initiated the crime has not been universally accepted. Some federal decisions have indicated that an unadorned solicitation does not constitute "inducement."⁵³ However, these cases do not neces-

51. *United States v. Watson*, 489 F.2d 504, 509 (3d Cir. 1973) ("any evidence negating the defendant's propensity to commit the crime" is sufficient); *accord*, *Kadis v. United States*, 373 F.2d 370, 374 (1st Cir. 1967) ("If the defendant shows, through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness."); *United States v. Riley*, 363 F.2d 955, 959 (2d Cir. 1966) (submission to the jury is not required if uncontradicted proof has established that the defendant was ready and willing to commit the offense, but "the production of any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be").

52. Cf. text accompanying notes 328-30 *infra*.

53. The Fourth Circuit has apparently construed the term "inducement" to require something more than mere solicitation. See *United States v. DeVore*, 423 F.2d 1069 (4th Cir. 1970), *cert. denied*, 402 U.S. 950 (1971). The defendant, a physician, sold thousands of Dexedrine pills to an undercover agent. The defendant did not claim that the agent had used any form of pressure or persuasion. He based his entrapment defense upon his testimony that he had made the sales as part of a secret plan to inculcate the buyer and turn him over to the police. The trial judge instructed the jury on entrapment. On appeal, the court ruled that entrapment had not been established as a matter of law, and added that the trial judge need not have given instructions on the issue because the defendant "failed to make an adequate showing of inducement." *Id.* at 1071.

The Fifth Circuit's position is unclear. One Fifth Circuit case contains language stating that the defendant must produce evidence which, if believed, would show that "the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it." *Pierce v. United States*, 414 F.2d 163, 168 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). However, the subsequent case of *United States v. Groessel*, 440 F.2d 602 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971), appears to construe this language to require that the defendant produce some evidence that he was corrupted, not that some hypothetical person might have been corrupted. See *id.* at 606 (Uncontradicted evidence indicated that the defendant in *Groessel* acquiesced without coaxing, but the court stated that he had met his burden of production, noting that he was employed as a fireman and apparently "en-

sarily mean that the federal defense requires evidence of improper conduct by the agent. They are equally consistent with the theory that the defendant may satisfy his burden by bringing forward evidence that the agent used persuasion, properly or improperly, in order to cause the offense.⁵⁴

joyed an unblemished reputation as an honest, law-abiding citizen.") *Groessel* seems consistent with the approach described in text accompanying note 50. On the other hand, in a more recent opinion, the court upheld the refusal of entrapment instructions in a mere solicitation case, remarking that

Costello [the defendant] himself testified that after a brief "social exchange" the party on the telephone, known to him only as Sue, asked him if he could get some "acid." He replied that he had heard of some and agreed to "check on it." Such testimony does not show the least reluctance on his part nor does it evince even an inference of inducement by Sue. According to Costello himself, Sue [the agent] merely inquired. She never tried to persuade.

United States v. Costello, 483 F.2d 1366, 1368 (5th Cir. 1973) (emphasis added). This language indicates that the *Costello* panel regarded "inducement" as something more than mere initiation.

A recent Ninth Circuit opinion could be read to define "inducement" as something more than mere solicitation. In *United States v. Christopher*, 488 F.2d 849 (9th Cir. 1973), the court affirmed a conviction in a case in which the trial judge had refused to give entrapment instructions, saying that

there is not a scintilla of evidence tending to show . . . that the appellants were unwilling to commit the crime or that the Government's deception planted the criminal design in the minds of the defendants. . . . The slight testimony which we have held allows the issue of entrapment to go to the jury must still constitute some evidence of inducement or persuasion by the Government.

Id. at 850-56. The *Christopher* court's attention was clearly focused upon the facts before it. In *Christopher*, uncontradicted evidence showed beyond doubt that the defendant was predisposed to sell heroin. *Christopher* does not necessarily mean that the Ninth Circuit would hold that instructions should not be given when, despite the fact that the government exerted no pressure, there is evidence that the defendant was "unwilling to commit the crime."

The pending Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. § 551 (1975), could be read to require that "inducement" be evidenced by something more than mere solicitation. The Act states that entrapment is a defense if "the defendant was not predisposed to commit the act and did so solely as a result of active inducement" by a federal agent, and that "mere solicitation that would not induce an ordinary law-abiding person to commit an offense" does not "in itself" constitute entrapment (emphasis added).

54. With the exception of *Pierce v. United States*, 414 F.2d 163 (5th Cir. 1969), which seems to have been undermined by subsequent cases, the cases cited in note 53 *supra* are all cases in which the defendant failed to produce any evidence that the agent had used persuasion, properly or improperly, to induce the offense.

Even if the cases were interpreted to mean that a defendant cannot satisfy his burden on inducement without producing evidence of improper persuasion, a federal defendant would still be entitled to acquittal

Moreover, the factual illustrations supplied by federal opinions indicate that the defendant may raise the issue of entrapment without necessarily producing evidence of improper police conduct. Evidence that the defendant hesitated before committing the criminal act and that he refused on other occasions to commit similar acts is sufficient to raise an issue for jury consideration,⁵⁵ as is any evidence that government agents pleaded or argued with the defendant on the occasion in question.⁵⁶ Evidence that a period of friendly conversation preceded a request to purchase moonshine whiskey has been considered sufficient to justify an instruction,⁵⁷ as has evidence that an undercover agent provided funds for a purchase of narcotics and transportation to the place of purchase.⁵⁸ One court has even indicated that the defense can be raised by evidence that the defendant had respectable employment and an unblemished reputation.⁵⁹

in some circumstances in which acquittal would not be required under the hypothetical-person approach. The defendant need only produce some evidence that an inducement occurred; he need not persuade the trial judge that the evidence is credible. Once he has produced the evidence, he is entitled to instructions which focus upon his predisposition rather than the quality of the agent's conduct. See text accompanying note 60 *infra*. More importantly, judges administering the hypothetical-person approach are likely to approve police conduct that would raise a jury issue under the federal test even if the inducement element of the federal test were construed to require some form of undue persuasion. See text accompanying notes 181-88 *infra*.

55. See *Kadis v. United States*, 373 F.2d 370, 374 (1st Cir. 1967); cf. *United States v. Cohen*, 431 F.2d 830 (2d Cir. 1970) (repeated requests for bribe by IRS agent); *Carson v. United States*, 310 F.2d 558 (9th Cir. 1962) (repeated requests by informer to whom the defendant owed 80 dollars). See also *United States v. Watson*, 489 F.2d 504 (3d Cir. 1973) (*held*, defendant presented sufficient evidence to require entrapment instruction by testifying to persistent, though noncoercive, requests by agent over three-month period).

56. See *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1962); *Carson v. United States*, 310 F.2d 558 (9th Cir. 1962); cf. *United States v. Workovich*, 479 F.2d 1142 (5th Cir. 1973).

57. See *United States v. Harrell*, 436 F.2d 606, 609-12 (5th Cir. 1970). See also text accompanying notes 181-83 (discussion of *Sorrells v. United States*, 287 U.S. 435 (1932)).

58. See *Johnson v. United States*, 317 F.2d 127 (D.C. Cir. 1963). In *Johnson*, the government agent also permitted the defendant to keep part of the narcotics that he had purchased for the agent as a reward for making the purchase. However, this action could not have affected the question whether the agent offered an inducement that might have led a hypothetical law-abiding person astray, since the division of the narcotics occurred after the commission of the crime and was not part of the original plan.

59. *United States v. Groessel*, 440 F.2d 602 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971). But see *Kadis v. United States*, 373 F.2d 370, 374 (1st Cir. 1967) (mere evidence of good reputation insufficient where defendant readily agreed to commit crime).

Once the defendant has satisfied his burden of production, he is entitled to jury instructions on entrapment. The federal courts have favored a standard instruction that focuses upon the issue of predisposition rather than the propriety of government conduct. The jury is told to acquit unless it finds beyond a reasonable doubt that the defendant was ready and willing to commit the crime at any favorable opportunity.⁶⁰ The degree of pressure that agents exerted upon the defendant—whether they used threats, appeals to sympathy or friendship, offers of inordinate gain—is of course relevant for its bearing upon whether the defendant was ready and willing, but it is not dispositive. Government pressure is only one of the evidentiary facts that the jury may take into account in deciding whether the defendant was predisposed to commit the crime.

3. *Federal Quasi-entrapment Defenses*

The federal entrapment defense is the product of decades of case law development. Among the hundreds of cases dealing

Two state cases from subjective-test jurisdictions provide illustrations of situations in which defendants were held to have raised the defense despite the fact that the inducements used were extremely mild. See *People v. Goree*, 240 Cal. App. 2d 304, 49 Cal. Rptr. 392 (Dist. Ct. App. 1966); *People v. Sarto*, 65 O.O.2d 353 (Mont. Co. Common Pleas 1973).

In the *Sarto* case, the agent, on meeting the defendant for the first time, made a simple request to purchase marijuana. The defendant acquiesced. In a jury-waived case, the trial judge acquitted the defendant of the sale count on grounds of entrapment. Applying the federal test, he noted that he credited the defendant's testimony that the marijuana sold was the defendant's own personal supply. *Id.* at 353.

In *Goree*, the officer merely requested that the defendant provide him with marijuana. The court held that the defendant was entitled to an entrapment instruction because the evidence indicated that he was normally a user, not a dealer.

Compare *State v. Bacon*, 114 N.H. 306, 319 A.2d 636 (1974). In *Bacon*, the defendant testified that, after two requests by the agents, he sold them his own supply (\$15 worth) of marijuana at no profit. Applying a statutory formulation of the hypothetical-person test modeled on the Brown Commission report and the Model Penal Code, the court held that the defendant had not produced sufficient evidence even to justify submitting the entrapment defense to the jury, since there was no indication of fraud, appeal to sympathy, or trickery on the part of the agents. It does not appear from the opinion whether the defendant had ever previously sold drugs; such evidence would presumably have been inadmissible unless known to the agents at the time of inducement. See text accompanying note 177 *infra*.

60. See note 39 *supra*. A majority of the federal courts which have considered the issue have ruled that, in order to avoid confusion, the jury should not be instructed that the defendant must show "inducement" in order to qualify for acquittal. See text accompanying notes 328-30 *infra*.

with issues described as "entrapment," a number may be found which resemble the standard entrapment defense in that they deal with situations in which an agent solicited commission of a crime, but differ from it in that they have excused defendants who were predisposed to commit the offenses charged. In order to get a rounded view of federal doctrine, it is necessary to consider the current status of these quasi-entrapment defenses.

a. The due process defense

Under federal law, proof that the defendant was predisposed will defeat the entrapment defense even if the agent used an improper inducement. However, in instances of particularly outrageous conduct by government agents, the defendant may be entitled to a quasi-entrapment defense based upon the due process clause.

The Supreme Court alluded to the possibility of a due process defense in the 1973 case of *United States v. Russell*.⁶¹ In *Russell*, an undercover agent had provided the defendant with an essential ingredient for manufacturing amphetamines. The defendant was clearly predisposed to commit the crime, and hence his defense did not fall within the traditional confines of entrapment doctrine. Nevertheless, the Ninth Circuit overturned his conviction on grounds that providing the ingredient constituted "an intolerable degree of governmental participation in the criminal enterprise."⁶² In reversing, the Supreme Court reiterated the traditional predisposition rule, and admonished that the entrapment defense was "not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve."⁶³ However, it did not completely close the door on the possibility that a predisposed defendant could be entitled to acquittal. The majority opinion by Justice Rehnquist indicated that in some circumstances police conduct might be so outrageous that the due process clause would prevent the government from obtaining a conviction notwithstanding the defendant's predisposition.⁶⁴

The *Russell* opinion did not describe the types of instigation which might be prohibited by due process. It simply repeated familiar formulas, saying that government conduct would be un-

61. 411 U.S. 423, 431-32 (1973).

62. *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972).

63. 411 U.S. at 435.

64. *Id.* at 431-32.

constitutional if it violated "fundamental fairness" and was "shocking to the universal sense of justice."⁶⁵ The Court cited *Rochin v. California*⁶⁶—the notorious stomach-pump case—as an example of sufficiently outrageous conduct.⁶⁷

One can only speculate about the coverage of the *Russell* due process defense. Inducements involving a threat of physical violence probably fall within its scope.⁶⁸ It may also apply to situations in which the plan for ensnaring the target involves commission of crimes that pose a danger to other persons or to the crim-

65. *Id.* at 432.

66. 342 U.S. 165 (1952).

67. The *Russell* case, 411 U.S. at 431-32, cited *Rochin* in a passage which reads as follows:

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952), the instant case is distinctly not of that breed.

In *Rochin*, state agents illegally broke into defendant's home and, after seeing him swallow some capsules, took him to a hospital where his stomach was pumped, producing two morphine capsules which formed the basis for his conviction. The case was decided before *Mapp v. Ohio*, 367 U.S. 643 (1961), so the illegal search and seizure in itself did not provide a basis for reversal. The Court held that the conviction could not stand because the police conduct involved "shocks the conscience." 342 U.S. at 172.

68. Threats of physical harm would normally prevent conviction under the federal entrapment defense, since there would be a reasonable doubt about predisposition if a crime were committed in response to such a threat. Some such threats would also require acquittal on grounds of duress.

However, it is possible to conceive instances in which a defendant who committed a crime in response to a threat of physical violence would not be entitled to acquittal on grounds of duress or entrapment. For example, suppose that a regular heroin dealer was reluctant to sell to an informer because he suspected the informer of being a government agent. If the informer induced a sale by a threat of harm at some future date, the defendant would not be entitled to acquittal by reason of duress. See W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 374-78 (1971). Predisposition might be demonstrated by evidence of contemporaneous sales to other persons, possession of large quantities of drugs and paraphernalia, and admissions of the defendant, thus defeating the traditional entrapment defense.

The *Russell* due process defense was raised in a recent case in which agents threatened physical harm. In *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975), the agents, posing as Italian gangsters, purchased some supposed heroin from the defendant. After discovering that the heroin was counterfeit, the agents confronted the defendant, collared him, and told him that "somebody would get hur[t]" if he did not straighten things out by returning the money or getting genuine heroin. The defendant later delivered heroin to the agents. His conviction was sustained. The court reasoned that the threat was a necessary part of the agents' undercover role. *Id.* at 878.

inal justice system. For example, Judge Friendly has indicated (in a case decided on other grounds) that the *Russell* due process defense might have prevented conviction of a defendant netted by a complex undercover investigation that involved perjury before a grand jury by an agent.⁶⁹ A similar view could be taken when an informer sells drugs, commits burglaries, or engages in other crimes harmful to third persons as a means of establishing his credibility with targets.⁷⁰ The defense may also be effective in areas where concern for overreaching government inducement overlaps with concern for first amendment freedoms, as where the government sends provocateurs into political organizations to suggest the commission of crimes.

The due process defense is also likely to be raised when agents have played a substantial role in leading or organizing a criminal enterprise. Before *Russell*, federal courts occasionally ordered judgments of acquittal on the ground that government agents had provided excessive assistance to would-be criminals.⁷¹ In two leading cases, the basis for decision was described respec-

69. *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973) (citing *Russell's* due process dictum).

70. *Cf. id.* at 676-77 (Friendly, J.): "It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction." *But cf. United States v. Spivey*, 508 F.2d 146 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975), where the defendant's conviction for selling heroin was affirmed despite the fact that the crime was induced by an informer who allowed the defendant to live rent-free in his apartment, supplied him with loans and free marijuana, and engaged in marijuana dealing himself.

71. For example, in the 1971 case of *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), the Court of Appeals for the Ninth Circuit directed the acquittal of three undoubtedly predisposed moonshiners. The defendants had recently been released from prison and, though willing to resume production of whiskey, they experienced some practical difficulties in doing so. A government agent encouraged them to make a new start, offering to supply equipment and a still operator. He did in fact supply 2000 pounds of sugar, and for over two years was the defendants' only whiskey customer. The court of appeals held that he had become so deeply enmeshed in criminal activity that the defendants were entitled to acquittal as a matter of law. It explicitly recognized that the entrapment defense did not apply, but reasoned that the policy supporting the defense justified establishing an analogous (and unnamed) defense. *Id.* at 786, 787. Other examples include *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated in light of Russell*, 412 U.S. 936 (1973), *conviction aff'd*, 494 F.2d 562 (7th Cir. 1974) (agents supplied would-be counterfeiters with a printer and supervised printing and delivery of the bills); *Russell v. United States*, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973).

tively as "entrapment" and as an unnamed doctrine founded upon "the same underlying objections which render entrapment repugnant."⁷² Since *Russell*, the entrapment rationale has been dropped and claims of excessive assistance have been treated as raising an issue of due process.

In at least one federal trial, the due process defense appears to have contributed to an acquittal. In that case—*United States v. Anderson*⁷³—the defendants ("The Camden 28") were accused of raiding a draft board and destroying records. They had been aided by an informer who subsequently admitted:

I provided 90% of the tools necessary for the action. They couldn't afford them, so I paid and the FBI reimbursed me. It included hammers, ropes, drills, bits, etc. They couldn't use some of the tools without hurting themselves, so I taught them. My van was used on a daily basis (the FBI paid the gas). I rented trucks for the dry runs and provided about \$20 to \$40 worth of groceries per week for the people living at Dr. Anderson's. This, and all my expenses, were paid for by the FBI.⁷⁴

The trial judge charged the jury that even if the defendants were predisposed to commit the crime, they were entitled to acquittal if the "overreaching participation" of the informer was "so fundamentally unfair [as] to be offensive to the basic standards of decency."⁷⁵ Since this instruction has been noted in a widely used manual of federal jury instructions,⁷⁶ it is likely that other federal judges will give similar instructions.⁷⁷

72. *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated in light of Russell*, 412 U.S. 936 (1973) (court held that evidence demonstrated entrapment as a matter of law); *Greene v. United States*, 454 F.2d 784, 786-87 (9th Cir. 1971) (court stated that the case was not an entrapment case, but that the "same underlying objections which render entrapment repugnant" required reversal of the conviction).

73. Cr. No. 602-71 (D.N.J. 1973). The trial judge instructed the jury on the due process defense. After a period of deliberation, the jurors asked for a reiteration of the instruction. They then continued deliberating and ultimately returned verdicts of acquittal.

One of the defendants' attorneys, Martin Stoler, talked to 11 of the jurors after the verdict. He reported that six of them told him that they voted for acquittal because of the due process instruction. Telephone interview with Martin Stoler, Esq., June 20, 1973.

74. Pretrial Affidavit by the informer, Robert Hardy, at 4, Feb. 28, 1972, filed in *United States v. Anderson*, Cr. No. 602-71 (D.N.J. 1973).

75. Record at 8728-29, *United States v. Anderson*, Cr. No. 602-71 (D.N.J. 1973).

76. 1 E. DEVITT & C. BLACKMAR, *supra* note 39, § 13.13, at 189-90 (Supp. 1974).

77. However, some federal judges may take the position that the due process issue should not be sent to the jury, on the theory that defenses based on a policy of controlling police rather than one of meting out justice to the particular defendant should be reserved for determina-

Despite the *Anderson* case, it seems clear that this "excessive assistance" defense will be difficult to sustain. Several federal courts of appeals have recently affirmed convictions in cases in which government participation was quite heavy. For example, in *United States v. McGrath*,⁷⁸ government agents provided some would-be counterfeiters with a printer and supervised the manufacture and delivery of the bills. The court of appeals originally sustained a defense based upon excessive assistance, but on remand from the Supreme Court after *Russell* it reversed course and held that the defense must fail. Other courts have upheld convictions in cases where the government provided an aviator to aid the defendants in smuggling marijuana⁷⁹ and where an informer provided laboratory equipment, technical advice, and ingredients for manufacturing amphetamines.⁸⁰

These cases demonstrate that in the wake of *Russell* lower federal courts have been reluctant to place constitutional restraints upon participation by investigators in criminal enterprises. This attitude is consistent with *Russell's* indication that the due process defense should be applied with restraint. However, *Russell* does not necessarily prevent use of nonconstitutional entrapment doctrine to protect a defendant who became involved in a type of crime that he otherwise could not have committed.

When the government has provided essential leadership or logistical support in committing a sophisticated crime (such as manufacture of drugs or counterfeiting), there will sometimes be serious doubt that the defendant would have been able to obtain similar support from other sources. Such cases raise the question whether a defendant is "predisposed" when he is willing to commit the type of crime charged, but would not be able to do so without extraordinary aid. This issue was not resolved in *Russell*, where the defendants had established a laboratory and manufactured drugs before receiving any government aid.⁸¹ Other

tion by the judge, because he can take a long-term view and articulate specific rules for official guidance. Cf. *Sherman v. United States*, 356 U.S. 369, 385 (1958) (Frankfurter, J., concurring).

78. *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated in light of Russell*, 412 U.S. 936 (1973), *conviction aff'd*, 494 F.2d 562 (7th Cir. 1974).

79. *United States v. Arias-Diaz*, 497 F.2d 165 (5th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); *United States v. Register*, 496 F.2d 1072 (5th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975).

80. *United States v. Weber*, 518 F.2d 987 (8th Cir. 1975).

81. See *United States v. Russell*, 411 U.S. 423, 431 (1973).

Supreme Court cases provide little guidance.⁸² A lower federal court could, therefore, take the position that a defendant is not "predisposed" unless he is both willing to commit the type of crime charged and *likely to do so*.⁸³ Under this view, there could be a reasonable doubt⁸⁴ about predisposition where the government provided extraordinary assistance, even if the defendant readily acquiesced in the crime.⁸⁵

b. The furnishing-contraband defense

Several federal courts have held that a defendant may not be convicted for possessing or selling contraband furnished to him by an agent.⁸⁶ Although some courts have characterized this

82. The Supreme Court has never attempted a comprehensive definition of "predisposition." Its statements that the entrapment defense is designed to protect "innocent" persons, *see* note 116 *infra*, are ambiguous; and its expressed concern that the defense protect persons who were led into crime by the "creative activity" of government agents, *see* *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Sorrells v. United States*, 287 U.S. 435, 451-52 (1932), is consistent with the view that a defendant who could not have committed the type of crime charged without excessive assistance by the government should be excused.

83. This view of entrapment is slightly at variance with the standard instruction quoted in note 39 *supra*. The instruction requires that the defendant be ready and willing, but not that he be ready, willing, and able to commit offenses of the nature charged without government assistance. However, this instruction, though consistent with the Supreme Court's doctrine in most of its applications, may not adequately reflect the Court's concern that the entrapment defense protect defendants who were led into crime by the "creative activity" of government agents. *See* note 82 *supra*.

84. Under federal law, the prosecution has the burden of proving predisposition beyond a reasonable doubt once the defendant has satisfied his burden of coming forward with evidence raising the defense. *See* cases cited in note 332 *infra*.

85. This approach might be justified on the theory that no purpose is served by convicting a person who would not have committed the type of crime charged without government assistance, since society needs no protection from persons who refrain from criminal activity, regardless of their reasons for doing so. *Cf.* *Carbajal-Portillo v. United States*, 396 F.2d 944 (9th Cir. 1968) (*held*, defendant who was willing to transport heroin from one place to another in Mexico in violation of Mexican law, but unwilling to take it across United States border because of fear of discovery, had been entrapped by agent who importuned him to cross border).

86. *See* *United States v. West*, 511 F.2d 1083, 1085-86 (3d Cir. 1975) (alternative holding); *United States v. Mosley*, 496 F.2d 1012, 1015-16 (5th Cir. 1974) (reversed for failure to instruct that, even if predisposed, defendant was entitled to acquittal if agent supplied him with the contraband); *United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973) (informer furnished drugs to defendant); *United States v. Dillet*,

rule as an aspect of the entrapment defense,⁸⁷ it falls outside the scope of the traditional federal defense, since it bars conviction even if the defendant was predisposed to commit the crime charged.⁸⁸

As a matter of policy, the furnishing-contraband rule is appealing. It seems easy to understand and to explain to police agents, and it seems to give clear guidance about the limits of permissible conduct. Moreover, it seems to strike at a dangerous and unnecessary law enforcement technique. If an agent suspects that a target is dealing in contraband, the agent can attempt to make a decoy purchase from him. There will normally be no need to provide the target with contraband; a person who has been trafficking will have his own sources. Indeed, the fact that an agent found it expedient to provide contraband raises a suspicion that the target was not predisposed. Of course, the factual question of whether the particular defendant was predisposed could be left to the jury under an appropriate instruction. However, the rule against furnishing contraband, like the exclusionary rule in search cases, can be seen as a prophylactic rule intended to protect innocent persons from police action intended for the guilty. An agent who feels free to give drugs to targets creates a danger of corrupting the innocent that an agent who merely makes decoy purchases does not.⁸⁹

265 F. Supp. 980 (S.D.N.Y. 1966) (defendant willingly acted as paid drug carrier between informer and agent). *Contra*, United States v. Hampton, 507 F.2d 832, 834-36 (8th Cir. 1974), *cert. granted*, 420 U.S. 1003 (1975); United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974) (if defendant is predisposed, fact that informer supplied contraband "unbeknownst to the government" would not justify acquittal).

87. See United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973); United States v. Dillet, 265 F. Supp. 980, 985-86 (S.D.N.Y. 1966).

88. See, e.g., United States v. Mosley, 496 F.2d 1012, 1016 (5th Cir. 1974) ("the law of this Circuit is that a defendant, where entrapment is an issue, may be acquitted for lack of predisposition, or, even though disposed, where the undercover agent supplies him with the contraband"); United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973) ("The government's case cannot rest on the mere fact that he entered into the Informer's plan willingly").

89. If officers and informers are allowed to possess and sell drugs for purposes of trapping users and sellers, there is a chance that the drugs will be used by the recipients, including novice users. There is also a chance that the drugs will be diverted to illegal channels before the decoy purchase can take place.

Other abuses may arise from the fact that a practice of furnishing contraband gives agents an excuse for possessing narcotics. For example, the Knapp Commission found that New York City police officers were "involved in possession and sale of narcotics in a variety of ways,"

Nevertheless, there are circumstances in which application of the furnishing-contraband rule might interfere with legitimate law enforcement. Mechanical application of the rule would have defeated prosecution in a recent case in which officers intercepted a drug smuggler about to make a delivery to drug dealers. The officers convinced him to incriminate his customers by going ahead with the delivery.⁹⁰ In another case, an agent who had infiltrated a large drug conspiracy was asked by the conspirators to deliver drugs to an established customer.⁹¹ He delivered heroin from Hong Kong to a drug dealer in California.⁹² Cases like these could be treated as falling outside the general rule, but only at the cost of complicating it and thereby making it more difficult for officers and informers to understand.⁹³

and that it was "common" for police officers to use narcotics as a medium of exchange for goods and services. Addict-informers carried on a lively business selling stolen merchandise to police officers in return for narcotics. COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTIONS AND THE CITY'S ANTI-CORRUPTION PROCEDURES, THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 105-10 (1973). Although the furnishing-contraband rule is certainly not a panacea for such practices, the rule would eliminate any excuse for agents to possess narcotics except during the brief interlude between making an undercover purchase and placing the narcotics in the police evidence locker. Therefore, the rule might facilitate enforcement of anticorruption measures. The rule might also make it more difficult for persons to act as informers while also selling drugs at a profit. Cf. *United States v. Dillet*, 265 F. Supp. 980, 986 (S.D.N.Y. 1966).

90. *United States v. Mahoney*, 355 F. Supp. 418 (E.D. La. 1973). The defendant's motion to dismiss was denied without prejudice. In a thoughtful opinion, the trial judge held that at trial

there will be a heavy burden on the government to show that these defendants were the intended recipients of this contraband, from some point in time prior to the government's involvement with it. This will be an essential element of the government's case against these defendants, because I am prepared to hold as a matter of law that entrapment was practiced in this case if Brannon, Caves and Mahoney are not in fact the original 'consignees' of this illicit merchandise, irrespective of any criminal predisposition on their part.

Id. at 428 (emphasis in original).

91. *United States v. Lue*, 498 F.2d 531 (9th Cir.), *cert. denied*, 419 U.S. 1031 (1974) (affirming conviction of heroin recipient over attack based upon contraband rule and due process dictum in *Russell*).

92. *Id.*

93. See, for example, the relatively elaborate rule prescribed by the trial judge in *United States v. Mahoney*, 355 F. Supp. 418 (E.D. La. 1973) (quoted in note 90 *supra*).

Conceptually, *Mahoney* and *Lue* can be regarded as cases which fall outside the contraband rule, rather than as exceptions to it. Thus, contraband discovered "in transit" or contraband delivered from a preestablished "connection" could be seen as contraband not "furnished" by the government. See *United States v. Chisum*, 312 F. Supp. 1307, 1312 (C.D. Cal. 1970):

The theoretical basis of the furnishing-contraband rule has never been entirely clear. One opinion based it upon the idea that the lower federal courts were free to follow the doctrine espoused in Justice Frankfurter's concurring opinion in *Sherman*.⁹⁴ This view was, of course, decisively rejected by the *Russell* case. Another leading case based it upon a strained interpretation of language in the majority opinions in *Sherman* and *Sorrells*, saying that the crime charged was the product of the "creative activity" of the government because without government-furnished contraband the crime would never have occurred.⁹⁵ This interpretation of Supreme Court doctrine would require acquittal in every case in which government activity was a but-for cause of the particular crime charged—i.e., in virtually every case in which the defense has ever been raised, including *Russell*.

Perhaps a more comfortable basis for the furnishing-contraband defense lies in the supervisory power of the federal courts.⁹⁶

This [holding dismissing indictment based upon possession of counterfeit money furnished by informer] does not mean that the government, after the discovery of contraband in transit, may not take effective measures to arrest the consignee for possession after it has been delivered. In such cases the government does not supply the contraband.

However, whether the "in transit" or "previous connection" cases are regarded as exceptions or as instances falling outside the rule, they nevertheless complicate the rule, which would be simpler and easier to apply if government officers and informers were absolutely forbidden to transfer contraband to targets.

94. *United States v. Dillet*, 265 F. Supp. 980 (S.D.N.Y. 1966).

95. *United States v. Bueno*, 447 F.2d 903, 906 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973).

The majority opinion in *Sherman v. United States*, 356 U.S. 369 (1958), stated that "[e]ntrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials." *Id.* at 372 (quoting *Sorrells v. United States*, 287 U.S. 435, 451 (1932)).

Apparently drawing on this language, *Bueno* said that:

The facts of this case clearly fit within the framework of the law [of entrapment]. If Defendant is to be believed, the sales of heroin were made through the *creative activity* of the government. The Defendant would not have had the heroin to sell if it had not been purchased by the Informer. In fact, this particular heroin would apparently not have been in the United States at all, if it had not been smuggled in by the Informer.

447 F.2d at 906 (emphasis added).

96. Cf. *Williamson v. United States*, 311 F.2d 411 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965) (supervisory power used as basis for reversing conviction in case in which informer had been offered contingent fee for apprehension of particular defendant). (For a discussion of *Williamson*, see text accompanying notes 104-11 *infra*.) But see *United States v. Gardner*, 516 F.2d 334, 343, n.3 (7th Cir.), *cert. denied*, 96 S. Ct. 118 (1975) (noting that *United States v. Russell* seems to disapprove of the use of supervisory power in circumstances such as those presented in *Williamson*).

However, the supervisory power has generally not been used to abort prosecutions except when police conduct has exceeded limits based upon the Constitution or statute,⁹⁷ and *Russell* seems to display an antipathy toward using it to enforce court-created limitations on police tactics.⁹⁸ Alternatively, the rule could be based upon the due process clause, though it seems that not every instance of furnishing contraband constitutes the sort of "shocking" or "outrageous" conduct that *Russell* indicated might offend the Constitution.⁹⁹ Moreover, the majority opinion in *Russell* expressed unwillingness to establish "fixed rules" of due process.¹⁰⁰ Instead of giving the rule constitutional status, the furnishing of contraband could be treated as a form of government leadership that will normally raise a reasonable doubt about the defendant's predisposition. This approach would, in appropriate

97. See Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193-212 (1969) (arguing that courts may not bar a prosecution because of otherwise valid police conduct that falls below standards of judicial propriety); Comment, *Entrapment Rationale Employed to Condemn Government's Furnishing of Contraband*, 59 MINN. L. REV. 444, 450 n.34 (1974); cf. *Sorrells v. United States*, 287 U.S. 435, 450 (1932) (federal courts lack the prerogative to decline to enforce criminal statutes on grounds of public policy). But see *Dixon v. District of Columbia*, 394 F.2d 966, 969-70 (D.C. Cir. 1968); *Williamson v. United States*, 311 F.2d 411 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965). In *Dixon*, Judge Bazelon invoked the supervisory power as the basis for dismissing a prosecution brought in retaliation for the defendant's breach of an agreement not to file a complaint against the prosecuting police officers. The two other judges on the panel concurred in the result but not in the opinion.

98. The Court noted that the conduct of the agent in the case before it had not violated due process, 411 U.S. at 431, any other constitutional provision, *id.* at 430, or any federal statute or rule. *Id.* at 430. It indicated that in the absence of such a violation a federal court should not dismiss a prosecution for overzealous law enforcement. *Id.* at 435. See also *United States v. Gardner*, 516 F.2d 334, 343 n.3 (7th Cir.), cert. denied, 96 S. Ct. 118 (1975) (described in note 96 *supra*).

99. For examples of such instances, see the cases cited in notes 90-93 *supra*.

Even in cases which do not fall within the "in transit" and "previous connection" categories, see notes 90-93 *supra* and accompanying text, the provision of contraband in particular circumstances may not shock the conscience. For example, even if the ingredient supplied by the agent in *Russell* had been contraband, his conduct would still not seem shocking, since the defendants had already established a laboratory for the manufacture of amphetamines and had previously obtained the same ingredient elsewhere.

100. *Russell* exhibited a reluctance to erect flat per se rules of due process in quasi-entrapment cases. The Court characterized the defendant's argument as one advocating a "rigid constitutional rule" and expressed concern about "the difficulties attending the notion that due process of law can be embodied in fixed rules." 411 U.S. at 431.

circumstances, require that the government bring forward evidence that the defendant was already engaged in criminal enterprise in order to satisfy its burden of production on the issue of predisposition.¹⁰¹

At any rate, it appears likely that the Supreme Court will soon resolve the uncertainty about whether the furnishing-contraband defense survives *Russell*. The circuits have divided on the issue,¹⁰² and the Court has recently granted certiorari in a case raising it.¹⁰³

c. The contingent-fee defense

In *Williamson v. United States*,¹⁰⁴ the Fifth Circuit reversed the conviction of a defendant who had been trapped by an informer working on a contingent-fee basis. Federal officers had promised the informer \$200 for incriminating Williamson.¹⁰⁵ Although Williamson was apparently ready and willing to sell moonshine whiskey,¹⁰⁶ his conviction for doing so was reversed on grounds that contingent-fee arrangements produce an intolerable danger that informers will persuade innocent persons to commit crime.¹⁰⁷ However, the court indicated that it would allow contingent-fee arrangements if their use could be "explained" or "justified" in a particular case—for example, by showing that the officers had sufficient grounds for believing that the target was engaged in crime.¹⁰⁸

In theory, *Williamson* had broad potential. It could have been construed to limit the widespread practice of offering leniency to arrested persons who agree to incriminate others by making purchases of contraband. These informers are likely to be

101. Cf. text accompanying notes 81-85 *supra* (discussion of the "excessive assistance" defense).

102. See note 86 *supra*.

103. *United States v. Hampton*, 507 F.2d 382 (8th Cir. 1974), *cert. granted*, 420 U.S. 1003 (1975).

104. 311 F.2d 441 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965).

105. The informer was promised \$200 for Williamson, \$200 for an associated defendant, and \$100 for a third associate, plus \$10 a day and gas expenses. *Id.* at 442.

106. The court acknowledged that

[u]nder the law of entrapment as developed in prior decisions of the Supreme Court and of this Court, no reversible error would appear except for the evidence of employment of the informer Moye on a contingent fee basis.

Id. at 444.

107. *Id.*

108. *Id.*

even more desperate to get convictions than persons who cooperate for money.

Despite its theoretically broad reach, *Williamson* has had virtually no impact. Courts faced with a defense based on it have almost invariably found a way to distinguish it.¹⁰⁹ It has been construed to apply only to cases where payment was contingent upon the conviction of a particular person.¹¹⁰ Even in such cases, officers have had little trouble justifying contingent-fee arrangements. The Fifth Circuit itself has affirmed convictions in contingent-fee cases on the basis of rather unimpressive showings of grounds for suspecting that the target was engaged in crime.¹¹¹

For reasons I have discussed in the section concerning the furnishing-contraband rule, *Russell* places the vitality of the contingent-fee rule in doubt. However, the rule had been so narrowly construed that it had little practical importance even before *Russell*.

d. The reasonable suspicion defense

Some federal opinions have suggested that a predisposed defendant may be entitled to acquittal on grounds of entrapment if the agent who solicited the offense lacked reasonable grounds

109. See, e.g., *United States v. Gardner*, 516 F.2d 334 (7th Cir.), cert. denied, 96 S. Ct. 118 (1975); *United States v. Jett*, 491 F.2d 1078 (1st Cir. 1974); *United States v. Grimes*, 438 F.2d 391, 395 (6th Cir.), cert. denied, 402 U.S. 989 (1971) (*Williamson* both distinguished and disapproved).

One recent commentator reported: "Apparently the only other reported decision following it is a 1968 federal district court decision." *Dix, Undercover Investigations and Police Rulemaking*, 53 *Tex. L. Rev.* 203, 287 (1975). The case referred to is *United States v. Curry*, 284 F. Supp. 458 (N.D. Ill. 1968).

110. See *United States v. Cuomo*, 479 F.2d 688, 692 (2d Cir.), cert. denied, 414 U.S. 1002 (1973); *Henly v. United States*, 406 F.2d 705, 706 (5th Cir. 1969); cf. *United States v. Jett*, 491 F.2d 1078, 1081 (1st Cir. 1974).

111. See *Hill v. United States*, 328 F.2d 988 (5th Cir.), cert. denied, 379 U.S. 851 (1964), where a contingent-fee arrangement was upheld because the agents knew that the defendant had a past record for moonshining and numerous complaints had been received from neighbors. Cf. *Harris v. United States*, 400 F.2d 264 (5th Cir. 1968). The court's opinion in *Harris* does not clearly indicate what the officers' grounds for suspicion were. The only specific evidence alluded to in the opinion was Harris's own admission that he had been "known" to "know about whiskey," and his speculation that that might have been the reason he had been contacted. *Id.* at 266 & n.4. See also *Sears v. United States*, 343 F.2d 139 (5th Cir. 1965). In *Sears* the court held that, in an investigation made more difficult by the fact that the defendant was a county sheriff, information received from the same informer who was promised the contingent fee was sufficient grounds.

to suspect that his target was engaged in criminal activity.¹¹² However, most of the circuits have rejected this theory,¹¹³ and *Russell* seems to have sapped it of any remaining vitality by indicating that the entrapment defense is intended to protect non-disposed defendants rather than to control police conduct.¹¹⁴

The "reasonable suspicion" doctrine has another face. Occasionally courts and commentators have suggested that the prosecution can *rebut* the federal entrapment defense by showing that at the time of the inducement police agents had reasonable cause to suspect that the defendant was engaged in the commission of crime.¹¹⁵ This approach seems contrary to the Supreme Court's

112. See *Childs v. United States*, 267 F.2d 619, 620 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 948 (1959) (defendant claimed that police had no probable cause to invite him to engage in criminal activity; in affirming conviction, court said that reasonable suspicion was sufficient); *Morales v. United States*, 260 F.2d 939, 940 (6th Cir. 1958) (lack of reasonable suspicion ground for reversing conviction); *Morei v. United States*, 127 F.2d 827, 836-37 (6th Cir. 1942) (same, alternative ground). See also *United States v. Perry*, 478 F.2d 1276 (7th Cir. 1971) (*semble*), *cert. denied*, 414 U.S. 1005 (1973); *Heath v. United States*, 169 F.2d 1007, 1010 (10th Cir. 1948) (in affirming conviction, court held that hearsay evidence was admissible to prove reasonable suspicion, stating that "officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in illegal activities"). The "reasonable suspicion" doctrine is discussed in *Dix, Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 249-54 (1975).

113. *United States v. Williams*, 487 F.2d 210, 211 (9th Cir. 1973), *cert. denied*, 416 U.S. 958 (1974) (trial judge correctly refused to give instruction that defendant should be acquitted unless agents had reasonable suspicion that defendant was already engaged in crime; conviction affirmed); *United States v. DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), *cert. denied*, 402 U.S. 950 (1971); *United States v. Catanzaro*, 407 F.2d 998 (3d Cir. 1969); *Kadis v. United States*, 373 F.2d 370, 373, 394 (1st Cir. 1967); *Whiting v. United States*, 321 F.2d 72, 76-77 (1st Cir.), *cert. denied*, 375 U.S. 884 (1963); *Kivette v. United States*, 230 F.2d 749, 754 (5th Cir. 1956), *cert. denied*, 355 U.S. 935 (1958); *United States v. Abdallah*, 149 F.2d 219, 222 n.1 (2d Cir.), *cert. denied*, 326 U.S. 724 (1945); *Swallum v. United States*, 39 F.2d 390, 393 (8th Cir. 1930). A comparison of the cases cited in notes 111-112 *supra* indicates that a majority of the circuits have rejected the reasonable suspicion defense, and that the position of most of the others is unclear.

114. For a discussion of this aspect of the *Russell* case, see notes 63, 96-103 *supra* and accompanying text.

One court of appeals has cited *Russell* as a basis for rejecting the reasonable suspicion defense. In *United States v. Williams*, 487 F.2d 210, 211 n. (9th Cir. 1973), the court noted that in *Russell*:

[T]he Court emphasized that the entrapment rule was designed to protect those innocent people cajoled into committing crimes, not as a tool to check overzealous police conduct. The reasonable suspicion requirement would not add to the protection already afforded the innocent by requiring proof of a defendant's predisposition. It is, rather, intended to control police conduct.

115. See *C.M. Spring Drug Co. v. United States*, 12 F.2d 852, 856 (8th

expressed desire to make the defense turn on the culpability of the defendant,¹¹⁶ since it would permit conviction of a previously innocent defendant who had been badgered into crime. (The fact that agents had reasonable cause to suspect crime does not, of course, mean that the defendant was actually engaged in crime. A belief may be reasonable and still be mistaken.)

The notion that reasonable suspicion is an alternative basis for rebutting the entrapment defense now seems to be falling into disrepute. It may safely be said that most federal courts would hold that an entrapment defense, once properly raised, can be defeated only by proving actual predisposition.¹¹⁷

Cir. 1926); *United States v. Siegel*, 16 F.2d 134 (D. Minn. 1926); Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 1, 48-49; cf. *United States v. Tyson*, 470 F.2d 381, 383 n.3 (D.C. Cir. 1972), cert. denied, 410 U.S. 985 (1973) (court confused the concepts of reasonable suspicion and predisposition, saying that "reasonable suspicion is all that is required to establish predisposition").

116. See *Sorrells v. United States*, 287 U.S. 435, 451 (1932) ("the controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials"). See also *Sherman v. United States*, 356 U.S. 369, 372 (1958) ("Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations").

117. There is language in at least one decision of this court tending to support the view that the critical predisposition inquiry is whether the officers had reasonable grounds to believe the accused had a predisposition. . . . The more recent entrapment decisions, however, . . . establish that the critical issue on the predisposition facet of that defense is not whether the officers who induced the accused had reasonable grounds to believe he had such a propensity, but whether he did, in fact, have such a propensity.

United States v. Walton, 411 F.2d 283, 291 n.12 (9th Cir. 1969).

In *United States v. Silver*, 457 F.2d 1217 (3d Cir. 1972), the trial judge had instructed the jury that if the federal narcotics agents "had reason to believe that these people were trafficking in drugs, then they had a perfect right to do what they did." *Id.* at 1221 (emphasis in original). The court of appeals decided that the instruction was reversible error, stating that "it is inconsequential whether law enforcement officials did or did not act on well-grounded suspicion that the defendant was engaging in wrongdoing, or whether they had probable cause for approaching the defendant." *Id.* at 1220 (emphasis in original). See also *United States v. Catanzaro*, 407 F.2d 998, 1001 (3d Cir. 1969).

The widely accepted standard entrapment instruction, *supra* note 39, focuses solely upon predisposition and does not mention reasonable suspicion. The paucity of recent cases raising the issue of whether reasonable suspicion can rebut an entrapment defense is probably attributable to the reluctance of trial judges to depart from the safety of the standard instruction. See *United States v. Silver*, *supra*, at 1220-21 (the trial judge "unhappily" decided to elaborate on the standard instruction).

4. Comparison of Federal Law and the Hypothetical-Person Defense

The principal differences between federal law and the hypothetical-person defense lie in the consequences attached to proof of predisposition and of agent misconduct. These differences can be illustrated diagrammatically:

FEDERAL LAW			
Inducement	Predisposition		
		nondisposed	predisposed
	"Outrageous"	Not Guilty (entrapment; due process)	Not Guilty (due process)
	Improper, but not outrageous	Not Guilty (entrapment)	Guilty*
	Not improper	Not Guilty** (entrapment)	Guilty
HYPOTHETICAL-PERSON DEFENSE			
Inducement	Predisposition		
		nondisposed	predisposed
	"Outrageous"	Not Guilty (entrapment; due process)	Not Guilty (entrapment; due process)
	Improper, but not outrageous	Not Guilty (entrapment)	Not Guilty (entrapment)
	Not improper	Guilty	Guilty

* Some federal courts would excuse the defendant on a quasi-entrapment theory when a government agent furnished contraband or when the government induced the crime by offering a contingent fee to an informer. See text accompanying notes 86-111 *supra*.

** Some federal cases could be interpreted to require that the defendant produce evidence of improper inducement in order to raise the entrapment defense. See note 53 *supra*. However, others clearly hold that no such evidence is required, note 50 *supra*, and the standard federal entrapment instruction permits the jury to acquit even if it finds that the agent acted properly. See note 39 *supra*.

As the diagrams illustrate, neither approach is uniformly more favorable to defendants than the other. Federal law is more favorable to nondisposed defendants who succumbed to inducements not sufficiently compelling to be deemed improper. The hypothetical-person defense is more favorable to predisposed defendants who have been subjected to improper inducements.

B. ADMISSION AND EXCLUSION OF EVIDENCE

1. *Admissibility of Evidence of the Nature of the Inducement Offered by the Agent*

Evidence about the nature of the inducement offered is admissible under either version of the entrapment defense. Since improper inducement is a dispositive fact under the hypothetical-person defense, evidence about it is indispensable. Under the federal test, evidence about the nature of the inducement is highly relevant for its bearing on the issue of predisposition. For example, if the inducement consisted of an unadorned offer to purchase drugs, the target's acquiescence in itself would indicate that he was predisposed. However, if the agent badgered the target with repeated requests, pretended withdrawal symptoms in order to play on the target's sympathy, or offered the target an inordinate price for a small quantity of drugs, then other evidence would be necessary to establish predisposition.¹¹⁸

2. *Admissibility of Evidence of the Defendant's Predisposition*

a. Predisposition evidence under the federal defense

Predisposition is a dispositive fact under the federal defense. Evidence bearing on it has been freely admitted.

Predisposition may be shown by evidence that the defendant had previously engaged in other criminal activity of the nature charged. This activity may be proven by prior convictions or by testimony about prior crimes which never led to conviction.¹¹⁹

Predisposition may also be shown by testimony about the target's actions during negotiations leading to the offense charged. The target may reveal his outlook by confiding or bragging to a police decoy about his past deeds or future plans.¹²⁰ His ready acquiescence in the agent's solicitation may itself indicate predisposition,¹²¹ as may displays of expert knowledge

118. See *Kadis v. United States*, 373 F.2d 370, 373 (1st Cir. 1967).

119. See, e.g., *Nutter v. United States*, 412 F.2d 178 (9th Cir. 1969), *cert. denied*, 397 U.S. 927 (1970) (prior conviction for similar offense); *United States v. Owens*, 346 F.2d 329 (7th Cir.), *cert. denied*, 382 U.S. 848 (1965) (other sales of drugs prior to offense charged). See generally Annot., 61 A.L.R.3d 293 (1975).

120. See, e.g., *Masciale v. United States*, 356 U.S. 386 (1958) (defendant bragged to officers about his heroin connections, inferentially contradicting his testimony that informer had pressured him into committing the offense).

121. See, e.g., *United States v. Ortiz*, 496 F.2d 705 (2d Cir. 1974); *United States v. Prieto-Olivas*, 419 F.2d 149, 151 (5th Cir. 1969); *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (dictum).

about criminal activity.¹²²

Subsequent events may throw retrospective light upon the issue of predisposition. The fact-finder may consider, for example, whether the defendant proved to have ready access to contraband,¹²³ whether a search of his dwelling turned up evidence of criminal activity,¹²⁴ and whether he later committed other crimes of a similar nature.¹²⁵

Many federal judges have been permissive about the form of predisposition evidence. They have admitted various types of hearsay and opinion testimony, including evidence about the defendant's reputation for criminal activity¹²⁶ and records of arrests that did not result in conviction.¹²⁷

b. Predisposition evidence under the
hypothetical-person defense

(1) Admission of predisposition evidence for its bearing on
the decency of police conduct

Advocates of the hypothetical-person defense have sometimes described it in terms suggesting that evidence of the de-

122. See, e.g., *Whiting v. United States*, 296 F.2d 512, 516-17 (1st Cir. 1961).

123. See, e.g., *United States v. Dickens*, 524 F.2d 441, 445 (5th Cir. 1975) ("ability of these defendants to supply large quantities of marijuana shortly after they had been requested to do so" was probative evidence of predisposition); cf. *United States v. Jenkins*, 480 F.2d 1198, 1200 (5th Cir. 1973) (defendant's post-crime statement, "If you need more, I'll be here," probative evidence of predisposition).

124. See, e.g., *Sherman v. United States*, 356 U.S. 369, 375 (1958) (fact that subsequent search of defendant's apartment failed to turn up narcotics used as one factor supporting a holding that defendant had been entrapped as a matter of law).

125. See, e.g., *United States v. Rodriguez*, 474 F.2d 587 (5th Cir. 1973) (another sale of drugs subsequent to offense charged admissible as evidence of predisposition).

126. See, e.g., *United States v. McKinley*, 493 F.2d 547 (5th Cir. 1974) (officer's testimony that unnamed informer had told him that defendant was "one of the major dealers of narcotics in the City of Mobile" held admissible); *United States v. Simon*, 488 F.2d 133 (5th Cir. 1973) (officer's testimony that confidential informer had told him that defendant had a reputation for dealing in drugs held admissible). This view has not been universally accepted, and some courts have not permitted such evidence to be used to prove predisposition. See notes 294-95 *infra*. An extended discussion of the use of reputation and other hearsay evidence to rebut the entrapment defense is contained in text accompanying notes 281-305 *infra*.

127. See, e.g., *Pulido v. United States*, 425 F.2d 1391 (9th Cir. 1970). *Contra*, *United States v. White*, 390 F.2d 405 (6th Cir. 1968) (alternative holding).

fendant's criminal propensities would be absolutely inadmissible. In his influential minority opinion in *Sherman v. United States*,¹²⁸ Justice Frankfurter stated that the question whether the intention to commit the crime originated with the defendant was "wholly irrelevant,"¹²⁹ and indicated that all evidence which would "show the defendant's reputation, criminal activities, and prior disposition" should be excluded.¹³⁰ He declared in sweeping terms that "[p]ermissible police activity does not vary . . . according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities."¹³¹

Similar statements appear in the commentary to the Brown Commission proposal and the Model Penal Code. The Model Penal Code commentary indicates that under its proposal neither prior convictions nor subsequent criminal activity would be admissible,¹³² and criticizes the federal defense for turning the courtroom inquiry away from the character of police conduct to "the history of the accused and his immediate reaction to enticement."¹³³ The Brown Commission commentary states that "[n]eedless to say, the accused's penchant for criminality, either on this occasion or in the past, is not to be placed in issue under this proposal, unless such evidence is admissible under some theory other than entrapment."¹³⁴

Statements such as these, as their authors would no doubt have recognized, cannot be applied with mechanical literalism. Even under a hypothetical-person test, it will sometimes be appropriate to admit evidence bearing on a defendant's "penchant for criminality." The ultimate aim of a hypothetical-person test is to acquit defendants who have been subjects of improper police conduct, either in hopes of preventing future misconduct,¹³⁵ or be-

For a discussion of whether arrest records should be admissible, see text accompanying notes 313-14 *infra*.

128. 356 U.S. 369, 382 (1958) (concurring opinion).

129. *Id.* at 382.

130. *Id.*

131. *Id.* at 383. Compare Comment, *Entrapment by Federal Officers*, 33 N.Y.U.L. REV. 1033, 1040 (1958):

[S]ince the test [urged in Justice Frankfurter's opinion] is not concerned with any particular defendant, but rather with a fictional "reasonable" defendant, evidence of the defendant's prior criminal record, his reputation, other grounds for suspicion by the officers, or his ready complaisance during the transaction, would be properly excluded as irrelevant.

132. MODEL PENAL CODE § 2.10, Comment at 20 (Tent. Draft No. 9, 1959).

133. *Id.*

134. BROWN COMMISSION COMMENTARY, *supra* note 13, at 320.

135. See MODEL PENAL CODE § 2.10, Comment at 20 (Tent. Draft No.

cause the purity of the courts would be soiled by a conviction acquired by unworthy action.¹³⁶ Sometimes no fair assessment of the decency of an agent's conduct can be made without considering what the agent knew about the defendant's propensity for crime.

For example: an undercover agent approaches his target with a request to buy drugs. The target responds by acknowledging that he is a drug dealer, but says that he is afraid to sell to the agent because he has heard that the agent may be working for the police. Instead of giving up, the agent badgers the target, appealing to past friendship, offering more than the market price, or even feigning the onset of withdrawal symptoms. These inducements, considered in the abstract, fall within the category of conduct that ought to be prohibited.¹³⁷ However, it is doubtful that a court following the hypothetical-person approach would hold that an entrapment had occurred, notwithstanding statements by wise men that "[p]ermissible police activity does not vary according to the particular defendant concerned"¹³⁸ or that attention should not be directed to "his immediate reaction to enticement."¹³⁹

The relevance of the particular defendant's predisposition to the decency of police conduct is not restricted to situations in which he displays criminality during negotiations attending the commission of the offense. Prior conduct can also be relevant. For example: an undercover agent is present in the defendant's apartment when the defendant sells drugs to other persons. For various reasons the agent does not want to solicit a purchase at that time. Therefore he fails to acquire evidence necessary to ensure conviction. A week later the agent asks the defendant to sell him drugs. The defendant answers that he has none. The agent persists. Repeated requests are proper under the circum-

9, 1959) (alluding to "deterrent effect" of hypothetical-person approach); BROWN COMMISSION COMMENTARY, *supra* note 13, at 306-07, 317; TIFFANY, *supra* note 13, at 267-70.

136. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 457 (1932) (Roberts, J., concurring); text accompanying notes 202-05 *infra*.

137. See, e.g., *Sherman v. United States*, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring) (condemning "[a]ppeals to sympathy, friendship, [and] the possibility of exorbitant gain"); BROWN COMMISSION COMMENTARY, *supra* note 13, at 307-08.

138. *Sherman v. United States*, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring).

139. MODEL PENAL CODE § 2.10, Comment at 20 (Tent. Draft No. 9, 1959).

stances. They would not be if the agent knew that the defendant was merely a user of drugs.

*Sherman v. United States*¹⁴⁰ was itself a case in which knowledge of the target's predisposition was relevant to assessment of the agent's conduct. The agent knew that the defendant was undergoing treatment for addiction. His offer to buy narcotics through the defendant was reprehensible because he knew of the defendant's propensity. The quality of his conduct would have been different if he had thought that his target was a non-user dealing in drugs for profit, or even if he had chosen his target at random. An agent's knowledge that his target has a weakness for a vice crime but is currently abstaining is surely a fact that merits consideration when assessing the agent's conduct.

The foregoing illustrations simply show what has long been known about the reasonable person of the law of torts—that a hypothetical person cannot be wholly hypothetical. He must be endowed with some of the actual qualities of the defendant.¹⁴¹ The qualities with which he is endowed ought to depend upon the purpose for which the hypothetical person has been created. His purpose in the entrapment context is to prevent the use of inducements that might have tempted nondisposed persons into crime.¹⁴² To serve this purpose, evidence of criminal proclivity ought to be taken into account when it bears on the question of whether the agent should have known that his inducement would create a substantial risk of corrupting a person not otherwise disposed to commit the offense. If such evidence is excluded, courts and juries will be taking a one-eyed view of the decency of police conduct.

Statutes based upon the Model Penal Code and the Brown Commission proposal¹⁴³ can be construed to permit introduction of predisposition evidence. Section 2.13(1)(b) of the Model Penal Code defines entrapment as "employing methods of persuasion or inducement which create a substantial risk that such an

140. 356 U.S. 369 (1958).

141. See Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927).

142. See, e.g., BROWN COMMISSION COMMENTARY, *supra* note 13, at 322-23: "The test there [in the Model Penal Code], as here, is an objective one, i.e., has the police conduct fallen below the minimum standards of decency required by society in the conduct of police affairs so that it bears a significant risk of embroiling innocent persons in criminal behavior." For further discussion of rationales of the hypothetical-person approach, see text accompanying notes 202-08 *infra*.

143. For citation of statutes based upon these model codes, see note 16 *supra*.

offense will be committed by persons other than those who are ready to commit it." The substantiality of the risk created cannot be assessed without considering the surrounding circumstances, including facts about the target that were known to the agent. An offer to purchase drugs at a premium creates a greater risk if the target is known to be an indigent drug user than if he is known to be a rich man. The risk of inducing a crime by one "not ready to commit it" is less if the agent has recently seen his target sell drugs to other persons than it is if he knows nothing about the target.

The Brown Commission's proposed statute is susceptible to a similar construction. Section 702(2) defines entrapment as "using persuasion or other means likely to cause normally law-abiding persons to commit the offense." The statute requires an assessment of the likelihood (i.e., risk) that the means used would induce crime in a normally law-abiding person. The risk created by the agent's inducement cannot fairly be assessed without considering the surrounding circumstances, including facts about the target which were known to the agent.

Moreover, the Commission's commentary is ambivalent about the exclusion of predisposition evidence. In explaining why the Model Penal Code definition was not adopted, it states that a new formulation was considered necessary "to insure that an objective standard is employed to determine whether police conduct is sufficiently unsavory to justify an entrapment defense," and the sentence immediately following states that "[n]eedless to say, the accused's penchant for criminality" is "not to be placed in issue . . . , unless . . . admissible under some theory other than entrapment."¹⁴⁴ However, a few pages later the commentary indicates that one of the factors relevant to the reasonableness of a police agent's conduct is whether he had a reasonable suspicion that the defendant was predisposed to commit the crime.¹⁴⁵ Con-

144. See BROWN COMMISSION COMMENTARY, *supra* note 13, at 320.

The last clause of the quoted language presumably refers to cases in which the defendant denies committing the criminal act and simultaneously raises the entrapment defense. If he then offers evidence of character to prove that he did not commit the act, this testimony can be rebutted by evidence of bad character. FED. R. EV. 404(a)(1). Evidence of prior criminal acts also would be admissible in such cases if relevant to matters such as intent, motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* 404(b). Moreover, in any case in which the defendant testifies evidence of certain prior convictions is admissible for impeachment purposes. *Id.* 609(a).

145. See BROWN COMMISSION COMMENTARY, *supra* note 13, at 322-23:

Proposed section 702 does not propose to limit governmental

sideration of that factor will obviously involve admission of evidence concerning "penchant for criminality."

The opinions of the three state supreme courts which have adopted the hypothetical-person defense by judicial decision can also be construed to permit introduction of predisposition evidence.

The first of these cases, *Grossman v. State*, stated that an entrapment occurs when an agent "induces another person to commit . . . an offense by persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense."¹⁴⁶ Although the court's use of the "average person" standard suggests that the inducement should be considered abstractly, its opinion elsewhere indicates that evidence of surrounding circumstances is admissible:

In applying the objective test we do not mean that the course of conduct between the officer and the defendant should be ignored. The transactions leading up to the offense, the interaction between the officer and the defendant, and the defendant's response to the inducements of the officer are all to be considered in judging what the effect of the officer's conduct would be on a normal person.¹⁴⁷

Because of its final clause, this language has elements of ambiguity. If in fact the only purpose for which the interaction between the defendant and the officer can be considered is "judging what the effect of the officer's conduct would be on a normal

inducements to those situations in which the government has "some knowledge at the time of the offer that its target might respond to a criminal suggestion." . . .

Neither the Model Penal Code's entrapment section nor its accompanying commentary adverts to this "reasonable suspicion" requirement. It is likely that the authors of the Model Penal Code's formulation felt that this issue could best be resolved within the context of their standard as proposed. The test there, as here, is an objective one, i.e., has the police conduct fallen below the minimum standards of decency required by society in the conduct of police affairs so that it bears a significant risk of embroiling innocent persons in criminal behavior. In determining whether police conduct meets the measure of this standard, it is necessary to evaluate a number of factors, of which their reasonable suspicion of the accused's predisposition is but one. The nature of their activity, its duration, and other factual considerations bulk large in resolving this objective test. None of these matters are specifically enumerated, but that is not to say that they are not relevant in a final appraisal of the police conduct.

146. 457 P.2d 226, 229 (Alas. 1969).

147. *Id.* at 230.

person," it would seem that the interaction could not be used to shed light upon the propriety of the officer's conduct by showing that his overtures were a permissible reaction to the target's statements. On the other hand, it is difficult to see how the defendant's reaction could show what a normal person would do in the circumstances. A normal person does not sell drugs even if a police decoy uses a fairly extreme inducement, and the fact that a particular defendant yielded is a rather insignificant basis for predicting what a normal person would have done. The quoted language is probably best understood as a caution that the permissibility of the agent's conduct is not to be determined out of context, and that the reaction of the defendant to initial overtures ought to be considered in judging the propriety of subsequent overtures.

The opinions of the other two supreme courts which have adopted a hypothetical-person test are also consistent with the theory that the agent's conduct is to be judged in the context of contemporaneous conduct by the defendant. The Iowa supreme court's opinion in *State v. Mullen*¹⁴⁸ adopts the Brown Commission's formulation of the defense and contains a passage about the admissibility of evidence of "transactional negotiations" between agent and target that is almost identical to the one quoted from *Grossman v. State*. The Michigan supreme court's opinion in *People v. Turner*¹⁴⁹ indicates that evidence about the defendant's response to the agent's overtures is admissible for purposes of evaluating the agent's later conduct by alluding to the fact that the defendant had warned the agent of the harmful effects of heroin.

Although the three opinions agree that evidence of the defendant's conduct during negotiations with the agent is admissible, they diverge on the question whether his prior conduct is also admissible. *State v. Mullen* takes the most restrictive view. The *Mullen* case involved a purchase of three ounces of hashish by an undercover police officer. The court reversed the defendant's conviction in an opinion indicating that on retrial the pre-

148. 216 N.W.2d 375, 382-83 (Iowa 1974):

In adopting an objective test we do not intimate that the transactional negotiations and conduct of the government official (or his agent) and the defendant should be ignored. What was said, and the defendant's response to the inducements, should all be considered in judging what the effect of the government conduct would be on normally law-abiding persons.

149. 390 Mich. 7, 13, 210 N.W.2d 336, 338 (1973).

siding judge should not admit evidence that the defendant had sold marijuana to the same police officer three months previously.¹⁵⁰

Grossman v. State seems to have reached the opposite result, despite the fact that its announced test—whether the inducement would be “effective to persuade an average person”—suggests that the agent’s conduct should be considered without reference to the history of the particular defendant. In *Grossman*, the defendant was charged with selling morphine to an undercover officer. The court indicated that the fact that on earlier occasions the defendant had agreed to obtain marijuana and dexedrine for the officer could be considered in deciding whether the officer’s later conduct was justifiable.¹⁵¹

People v. Turner also indicates that evidence of prior activities will be admissible. In *Turner*, police agents engaged in a two-year campaign to purchase drugs from the defendant. All that they succeeded in getting during this period was caffeine pills. After closing the investigation for a few months, the agents decided to try again. They cultivated the defendant’s friendship with favors and friendly gestures. Finally, one of them asked the defendant to supply some heroin, saying that it was for a girlfriend “who was an addict and very good looking and who would quit dating him if he didn’t find some heroin for her.”¹⁵² The defendant obtained a small amount of heroin for the agent. He subsequently declined to make other sales, although he did introduce the agent to the person from whom he had gotten the heroin.¹⁵³

In ordering acquittal, the Michigan supreme court stated that it was adopting the “objective” test and aligned itself with the minority opinions of Justices Roberts, Frankfurter, and Stewart.¹⁵⁴ However, it seemed to impose no restrictions upon the evidence which could be considered in judging the propriety of the

150. 216 N.W.2d at 377.

151. The defendant sold morphine to the officer on December 18, in response to a solicitation made on December 13. Previously, on December 2 and 3, the defendant had agreed to obtain dexedrine and marijuana for the officer. The officer subsequently pursued a “policy of friendship” with her, seeing her almost every day until the arrest. The court remarked, “After appellant evinced an interest in supplying marijuana and dexedrine pills to [the officer], he was justified in continuing his contacts with her and in asking to purchase morphine.” 457 P.2d at 231.

152. 390 Mich. at 13, 210 N.W.2d at 338.

153. *Id.* at 14, 210 N.W.2d at 338.

154. *Id.* at 22, 210 N.W.2d at 342.

agent's conduct. In support of its conclusion that entrapment had been established as a matter of law, the court noted that the police had no cause to believe that the defendant was dealing in drugs when the investigation began, that the first investigation of the defendant had turned up nothing, and that the trial judge had found that the defendant was not a dealer in drugs.¹⁵⁵ At the very least, *Turner* stands for the proposition that the defendant may introduce evidence about lack of criminal propensity when it relates to the propriety of the agent's conduct. If he does so, surely the prosecution must be permitted to rebut with evidence that the agent knew of prior criminal activity.

- (2) Admission of predisposition evidence to show causal relationship between government misconduct and the offense

Because of uncertainty about the nature of the causal relationship between inducement and crime required by substantive doctrine under the hypothetical-person approach,¹⁵⁶ it is difficult to predict circumstances in which predisposition evidence would be admissible on this issue. However, two examples will suffice to suggest circumstances in which an argument for admissibility could be made.

A strong case for admission would be presented if a defendant claimed that, like the unfortunate addict in *Sherman v. United States*,¹⁵⁷ he was launched on a criminal career by the activities of an agent. For example, he might claim that, even though no improper pressure had been exerted by the particular officer to whom he sold drugs, his entire career as a drug dealer

155. In explaining why it considered the conduct of the officers to be improper, the *Turner* court, *id.* at 23, 210 N.W.2d at 343, mentioned the following factors: (1) "there was no intimation at all that Turner was dealing in heroin when the investigation began," (2) "the first investigation turned up nothing," (3) "the sale only occurred after the invention of a fictitious girlfriend [with withdrawal sickness] to play on the sympathy of a friend," and (4) "Turner was not found to be a [regular] dealer in drugs by the trial court." Two of these factors clearly seem to relate to the knowledge of the agent about the defendant's predisposition rather than to the nature of the agent's inducement. The fourth factor seems to be inappropriate in an opinion adopting any version of the hypothetical-person test, since it relates to the defendant's predisposition per se and not to what was known by the agent at the time of the inducement. Only the third factor, the invention of the fictitious girlfriend, could properly be considered by a court taking the position that predisposition evidence is absolutely irrelevant under the hypothetical-person test.

156. See text accompanying notes 34-37 *supra*.

157. 356 U.S. 369 (1958).

was the product of another agent's overreaching inducements. In such a case, the prosecution ought to be permitted to put in evidence of prior criminal activities in order to rebut the defendant's claim that the agent launched his criminal career. If the defendant regularly dealt in drugs before meeting the agent, the agent's conduct, even if improper, would not have caused the defendant's unrelated sale to a second agent.

A less appealing case for admissibility is presented by the situation in which the prosecution seeks to introduce predisposition evidence to show that the offense was not caused by the overreaching aspect of its agent's conduct. A plausible argument can be made that predisposition evidence ought to be admissible for this purpose in states that have adopted the Model Penal Code's entrapment provision. Section 2.13 of the Code, which requires the defendant to prove that his conduct occurred "in response to" an "entrapment" by an agent,¹⁵⁸ could be interpreted to permit conviction when the offense occurred in response to something other than the improper aspect of the agent's inducement. For example, suppose that an agent sought to induce the sale of drugs by an improper appeal to the defendant's sympathy. The defendant was unmoved, and declined to deal with the agent because he suspected a trap. Later his fears were assuaged, so he contacted the agent and consummated the sale. Even though the defendant's conduct occurred in response to the agent's solicitation, it did not occur in response to the aspect of the agent's solicitation that made it an "entrapment."

Although this interpretation of the Model Penal Code's language is plausible, it would defeat the Code's intention to focus upon government misconduct by opening the door to routine ex-

158. MODEL PENAL CODE § 2.13(2) (Official Draft, 1962) (quoted in note 17 *supra*). See PA. STAT. ANN. tit. 18, § 313(b) (1973), which adopts the Model Penal Code's requirement that the defendant prove that his conduct occurred in response to an entrapment.

The case of *United States v. Ewbank*, 483 F.2d 1149 (9th Cir. 1973), provides an example of a lack of causal connection between the improper aspect of an agent's conduct and the defendant's crime. In a jury-waived trial, the defendant testified, and the trial judge believed, that an agent had engaged in a persistent campaign to get the defendant to sell drugs to him. After repeated refusals, the defendant sold the agent a vial of hashish oil. The trial judge found the defendant guilty on grounds that his conduct has been caused by a desire to do a favor for a third person (the owner of the hashish oil) instead of by the agent's badgering. Arguably, the same result could have been reached under the Model Penal Code. Cf. *United States v. Abbadessa*, 470 F.2d 1333, 1337 (10th Cir. 1972) (jury could have believed that defendant acted as intermediary to help seller-friend rather than to help agent).

ploration of the defendant's predisposition under the guise of determining the issue of causation. In almost every case a reasonable claim could be made that the defendant acted "in response to" his criminal proclivities rather than the overreaching aspect of the government's inducement. Such an interpretation of the hypothetical-person defense would not make it completely identical to the federal defense, since under the federal defense a predisposed person would be guilty whether he acted in response to pleas for sympathy or in response to his criminal proclivities. However, it would permit more broad-ranging consideration of predisposition evidence than the framers of the Model Penal Code could have intended.

c. Comparison of the admissibility of predisposition evidence under the federal defense and the hypothetical-person defense

There is a great deal of uncertainty about how the treatment of predisposition evidence under the hypothetical-person defense will differ from its treatment under the federal defense. However, a few tentative observations can be made:

(1) Negotiations between agent and defendant

In cases in which the evidence of inducement and predisposition consists exclusively of conversations between an agent and his target, there seems to be little practical difference between the federal defense and a hypothetical-person test. Under either version of the defense, evidence about the negotiations leading to the offense is likely to be admissible. Such evidence is highly relevant both to the quality of the agent's conduct and to the defendant's predisposition.

(2) Prior convictions

Evidence of prior convictions will probably be excluded by courts following the hypothetical-person test. The founding fathers of this approach—the Justices of the Supreme Court minorities,¹⁵⁹ and the draftsmen of model codes¹⁶⁰—have consistently opposed admission of prior convictions. They have theo-

159. See *United States v. Russell*, 411 U.S. 423, 439, 443-44 (1973) (Stewart, J., concurring); *Sherman v. United States*, 356 U.S. 369, 378, 382-83 (1958) (Frankfurter, J., concurring); *Sorrells v. United States*, 287 U.S. 435, 458-59 (1932) (Roberts, J., concurring).

160. See MODEL PENAL CODE § 2.10, Comment at 20 (Tent. Draft No. 9, 1959); BROWN COMMISSION COMMENTARY, *supra* note 13, at 325.

rized that police may pursue ex-convicts with particular zeal, employing extreme inducements and relying upon proof of prior convictions to overcome the entrapment defense.¹⁶¹ This practice is thought to be contrary to the rehabilitative ideals of modern penology, since it may cause persons who have reformed to relapse into crime.¹⁶² It seems unlikely that courts following a doctrine based upon this tradition would admit evidence of prior convictions, whatever its bearing on the decency of police conduct in a particular case.

The federal courts will probably continue to admit such evidence, if only because its admissibility is well established.¹⁶³ However, the admission of such evidence is not an inevitable consequence of making predisposition a dispositive fact. The decision whether to exclude or admit such evidence depends more upon one's views about the sagacity of jurors and the likelihood that agents will pursue past offenders than it does upon anything inherent in the nature of the subjective approach. If admission of evidence of prior convictions prejudices the jury or causes police to treat ex-convicts unfairly, then the evidence should be excluded regardless of which substantive test of entrapment is applicable. An occasional state court following the subjective approach has adopted this view, excluding evidence of prior convictions while adhering to the rule that the defendant's predisposition is a dispositive fact.¹⁶⁴

161. See, e.g., *United States v. Russell*, 411 U.S. 423, 443-44 (1973) (Stewart, J., concurring); *Sherman v. United States*, 356 U.S. 369, 382-83 (1958) (Frankfurter, J., concurring); BROWN COMMISSION COMMENTARY, *supra* note 13, at 306-07. One of the leading recent cases, *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973), quoted Justice Stewart's observation that

[the] subjective test means that the Government is permitted to entrap a person with a criminal record or bad reputation, and then to prosecute him for the manufactured crime, confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway.

Id. at 21, 210 N.W.2d at 342.

162. Justice Frankfurter expressed this concern in his *Sherman* opinion, saying:

Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view.

163. *Sherman v. United States*, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring), *quoted in* *Grossman v. State*, 457 P.2d 226, 229 (Alas. 1969). For an extended discussion of the admissibility of evidence of prior convictions, see text accompanying notes 315-24 *infra*.

164. See cases cited in note 320 *infra*.

(3) Unpunished crimes

The federal courts will doubtless continue to treat evidence of unpunished criminal activity as admissible for its bearing on the issue of the defendant's predisposition.¹⁶⁵ Such evidence, for reasons I have given, may also be highly relevant to an assessment of the quality of the police agent's conduct. Reliable knowledge that the defendant is engaged in a criminal enterprise can justify persistence that otherwise would pass the bounds of decency. Knowledge that the defendant has a proclivity for vice but is currently abstaining may make reprehensible an offer that otherwise would be innocuous. Moreover, the goals of rehabilitating criminals and preventing overzealous pursuit of ex-convicts are not undermined by the use of evidence of unindicted crimes. It seems likely that many of the jurisdictions following the hypothetical-person approach will permit such evidence to be considered. Two of the three state supreme courts that have adopted it by judicial decision have indicated their willingness to do so.¹⁶⁶

(4) Reputation evidence

The progenitors of the hypothetical-person approach repeatedly criticized the federal defense for allowing evidence of a defendant's reputation for criminality to be admitted.¹⁶⁷ They assumed that a hypothetical-person test would render such evidence irrelevant. In fact, a police agent's knowledge of the defendant's reputation may cast some light upon whether he has acted decently. The agent who offers a temptation to a target

165. For extended discussion of the admission of evidence of unpunished crimes under the federal test, see text accompanying notes 306-14 *infra*.

166. See notes 150-54 *supra* and accompanying text.

167. Reputation evidence and evidence of prior convictions were generally linked as the two paradigm examples of prejudicial evidence admissible under the subjective approach. See, e.g., Justice Stewart's dissenting opinion in *Russell*, 411 U.S. at 443 ("the Government is permitted to entrap a person with a criminal record or bad reputation"); Justice Robert's concurring opinion in *Sorrells*, 287 U.S. at 458 ("[t]he proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted"); and Justice Frankfurter's concurring opinion in *Sherman*, 356 U.S. at 382 ("[t]he defendant must either forego the claim of entrapment or run the substantial risk that . . . the jury will allow a criminal record or bad reputation to weigh in its determination of guilt"). On the evils of reputation evidence, see also Donnelly, *supra* note 13, at 1108-09.

with a notorious reputation as a drug dealer has acted more justifiably than one who offers the same temptation to a target reputed to be a law-abiding former addict. However, condemnation of reputation evidence is one of the traditional tenets of supporters of the hypothetical-person approach, and one may expect that jurisdictions which adopt the approach will exclude it. Its probative value is slight in comparison with evidence of specific criminal acts, and the danger of prejudice probably outweighs whatever value it has.

The use of reputation testimony to rebut an entrapment defense seems to have been ratified by the Federal Rules of Evidence, so federal courts will probably continue to admit it.¹⁶⁸ State courts may, however, accept the substantive elements of the federal defense while rejecting its evidentiary trimmings. Making predisposition a dispositive fact by no means requires acceptance of the notion that it can be proven by reputation evidence.¹⁶⁹

(5) Other hearsay testimony

Some federal courts have permitted predisposition to be proven by hearsay testimony about specific acts—for example, by an agent's testimony that an informer reported buying drugs from the defendant.¹⁷⁰ Others have excluded this type of evidence.¹⁷¹ The new Federal Rules of Evidence do not provide an exception to the hearsay rule for entrapment cases¹⁷² (except for reputation testimony¹⁷³), so there seems to be no basis for con-

168. See FED. R. EV. 405 (providing that when a trait of character is an essential element of a claim, charge, or defense, proof may be made by evidence of specific instances of conduct or by reputation and opinion testimony). See text accompanying notes 296-97 *infra*. Reputation testimony is excepted from the hearsay rule by FED. R. EV. 803(21).

169. See text accompanying notes 281-305 *infra*.

170. See cases cited in note 284 *infra*.

171. See cases cited in notes 294-95 *infra*.

172. See FED. R. EV. 801-04. The rules contain provisions for common-law development of new hearsay exceptions, but the new exceptions are required to have "circumstantial guarantees of trustworthiness" equivalent to those of the established exceptions. See FED. R. EV. 803(24); *id.* 804(b)(5). The willingness of some courts to admit hearsay in rebuttal of the entrapment defense seems to be a consequence of the disfavored nature of the defense rather than of any belief that the testimony has "circumstantial guarantees of trustworthiness" equivalent to those of other hearsay exceptions.

173. FED. R. EV. 803(21) excepts reputation as to character from the hearsay rule. FED. R. EV. 404-05 describe the circumstances in which reputation as to character is admissible.

tinuing to admit it. In fact, there may be a stronger argument for admitting testimony of this nature under the hypothetical-person test than under federal law. Testimony by an officer that an informer told him about a drug sale by the defendant would not be hearsay under the hypothetical-person defense. It would be offered not to show the truth of the matter asserted, but to show its effect on the hearer—that is, to show that the officer acted reasonably in offering an inducement (or in offering a persuasive inducement) to the defendant.¹⁷⁴ Thus, it is possible that some types of out-of-court declarations will be admitted under the hypothetical-person defense even though they would not be admissible under the federal defense.¹⁷⁵ However, it would be appropriate for a trial judge in a hypothetical-person jurisdiction to exclude such evidence where the chance that it would be used for a forbidden purpose outweighed its value in assessing the decency of the agent's conduct.¹⁷⁶

(6) Facts not known to agent

Under the federal defense, facts about the defendant which tend to show predisposition are admissible whether or not they were known to the agent at the time of the inducement. Such facts sometimes provide very convincing evidence of predisposition. Eyewitness testimony that the defendant committed a similar crime a week after the alleged entrapment or that (unknown to the agent) he did so a week before it can be very effective in rebutting the defense. So can testimony that after the offense the defendant admitted that he had been engaged in a continuous criminal enterprise.

Under the hypothetical-person defense, evidence of predisposition would seem to be inadmissible unless the police agent knew about it at the time he offered the inducement. If the evidence was not known to the agent, it could not be relevant to a judgment about whether his conduct was reasonable—that is,

174. An out-of-court statement is hearsay if it is offered to prove the truth of the matter asserted therein. See, e.g., FED. R. EV. 801(c); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 249 (2d ed. 1972). Statements offered for their bearing on the good faith or reasonableness of subsequent conduct of the hearer are not hearsay. See *id.* at 589-90.

175. See text accompanying notes 294-96 *infra*.

176. Compare FED. R. EV. 403; UNIFORM RULES OF EVIDENCE § 403. Of course, the complete exclusion of such evidence from the fact-finder's knowledge can only be accomplished in jurisdictions which send the issue to the jury. Many supporters of the hypothetical-person approach prefer that entrapment be the province of the trial judge. See note 341 *infra*.

whether his methods of inducement created an impermissible risk of leading a hypothetical person astray. Such evidence should be admissible only in the rare case in which there is a genuine issue about the causal connection between the agent's conduct and the defendant's criminal act.¹⁷⁷

III. EVALUATION OF THE HYPOTHETICAL-PERSON DEFENSE

A. POTENTIAL DETRIMENTS

1. *Acquittal of Chronic Offenders*

One danger of the hypothetical-person defense is that it will lead to acquittal of persons who should be convicted. By focusing upon the conduct of agents instead of the criminal proclivities of the defendant, it creates a risk of acquitting dangerous chronic offenders.

The danger of acquitting chronic offenders would be ameliorated somewhat if evidence of a defendant's involvement in criminal activities were admitted for its bearing upon the decency of the agent's inducement.¹⁷⁸ However, so long as the defense focuses upon the quality of the agent's conduct rather than the defendant's character, such evidence would be admissible only where it was known to the agent at the time of the inducement, and only for the purpose of evaluating his conduct.¹⁷⁹ Evidence having an important bearing upon culpability would still be excluded. For example, testimony that police had discovered contraband or other indicia of criminal activity in a subsequent search of the defendant's premises¹⁸⁰ or that (unknown to the

177. See text accompanying notes 156-58 *supra*.

178. See text accompanying notes 128-53 *supra*.

179. See text at 215 *supra*.

180. A target's favorable response to a police solicitation may lead to a search of his dwelling. For example, police agents may, by an appeal to sympathy or friendship, induce a target to sell a small amount of drugs. The sale could provide probable cause for a search of the target's dwelling, thereby leading to the discovery of other drugs. Under the federal defense, evidence of the possession of other drugs could be used to prove predisposition to sell or as a basis for indicting the defendant on a separate charge of possession or possession with intent to distribute.

Under the hypothetical-person approach, such evidence could not be used for the purpose of showing that the defendant was predisposed to make the original sale. Moreover, if the defendant were charged with possession of drugs found during the search, he could argue that the evidence ought to be excluded as the fruit of an illegal entrapment. The preventive rationale of the hypothetical-person approach would support this argument, since allowing the police to take advantage of the ancillary fruits of an entrapment might encourage overreaching conduct.

agent) the defendant regularly participated in criminal enterprise would be inadmissible.

2. Conviction of Nondisposed Defendants

A more subtle danger of the hypothetical-person approach is that it will result in the conviction of persons who ought to be acquitted. It creates a risk of convicting nondisposed persons who were not already engaged in criminal activity and who might never have committed the type of crime charged but for the agent's overtures. This risk arises from the fact that the defense focuses upon the inducement offered by the agent—whether he made an undue appeal to friendship, sympathy, fear, or the possibility of inordinate gain. If the inducement offered would not have tempted a hypothetical law-abiding person, the fact that the particular defendant was led astray will not save him, even if he had never before performed an act of the nature induced by the agent.

Very frequently, an agent will need to make more than one solicitation. The target may initially disclaim any connection with illegal activity, or tell the agent that he lacks present ability to fulfill the request. The agent will persist, but without exerting any overwhelming pressure. Such cases pose a special dilemma for the hypothetical-person defense. This dilemma can be illustrated by considering the situation presented by the Supreme Court's first major entrapment case, *Sorrells v. United States*.¹⁸¹ The officer, a prohibition agent, testified that while posing as a tourist he visited the home of the target.¹⁸² He was introduced by three local residents who were acquaintances of the target. The agent asked the target to get him some liquor. The target replied that he did not have any. After some friendly conversation, the agent made a second request without success. The conversation turned to war experiences. (The agent and the

181. 287 U.S. 435 (1932).

182. *Id.* at 439. For purposes of this example, the testimony of the officer has been used. The defense witnesses gave slightly different testimony. They said that there had been three to five requests, that the defendant had said that he "did not fool with whiskey," and that the defendant was absent for 20 or 30 minutes while getting the whiskey. See *id.* at 439-40.

The Supreme Court held that the question of entrapment turned on the defendant's predisposition, and reversed the conviction because the trial judge had refused to give entrapment instructions. *Id.* at 452. In a minority opinion, Justice Roberts said that entrapment had been established as a matter of law, so the indictment should be quashed. *Id.* at 459 (separate opinion).

target had been members of the same division during the First World War, though they had not met during their service.) Then the agent made a third request. The target relented and sold the agent a half gallon of whiskey for five dollars.

A tribunal that must decide whether to convict on the basis of the evidence just described faces a hard choice. If it holds that such inducements are permissible, then some defendants will be convicted who might never have sold whiskey but for the friendly overtures of an agent. On the other hand, if it deems the agent's conduct to be an entrapment, then apparently any bootlegger (or drug dealer in a comparable situation) can do business freely if he screens his new customers by engaging them in friendly conversation for an hour or two and refusing to sell until the third request. (It is perhaps more likely that bootleggers would not be able to do business freely, because agents would extinguish such an extreme rule by misrepresenting what took place—but that is not a desirable result either.) Because of the restrictions such a result would place on law enforcement, it seems probable that many courts applying the hypothetical-person approach would hold conduct like that of the agent in *Sorrells* to be permissible, notwithstanding the willingness of the *Sorrells* minority to find entrapment as a matter of law.

Repeated solicitations of this nature raise a jury issue under the federal test.¹⁸³ The jury could consider a variety of evidence in addition to the conversation between the officer and the defendant. The defendant could bring forward evidence tending to show that he was not engaged in the whiskey business. For example, he could produce evidence that officers searched his premises under a warrant and failed to find any of the trappings of a moonshiner. He could show that he was regularly employed and living within his means. He could testify that he had bought the whiskey elsewhere on behalf of the agent, and corroborate this testimony with evidence that he absented himself for some time while getting the whiskey. His neighbors could testify about his character.

Even if the defendant lacked evidence of the nature described, he could argue that the prosecution's failure to introduce evidence of predisposition raised a reasonable doubt. The exclusion of evidence about prior criminal activity, prior convictions, and subsequent conduct evincing predisposition is a double-edged

183. See *Sorrells v. United States*, 287 U.S. 435 (1932). See also *United States v. Abbadessa*, 470 F.2d 1333, 1336 (10th Cir. 1972).

sword. In some cases the defendant will be aided by a test that treats such evidence as inadmissible, particularly if he is a chronic offender who has regularly engaged in criminal activity. However, if the defendant was not predisposed, refusal to admit such evidence may harm him. If predisposition evidence is admissible and the government is unable to come forward with it, the *absence* of such evidence may raise a reasonable doubt about the defendant's guilt.¹⁸⁴ By dispensing with predisposition evidence (except perhaps when it bears on the propriety of police conduct),¹⁸⁵ the hypothetical-person test aids the chronic offender at the expense of the nondisposed novice.

Almost every inducement by an agent involves some degree of appeal to friendship, sympathy, or desire for profit. An agent seeking to simulate bribery of a corrupt public official must cultivate the official's friendship and trust. An agent seeking to purchase a small amount of narcotics often must pose as an addict who has lost his ordinary source of supply, thereby implicitly appealing to sympathy because of the imminence of withdrawal. Moreover, an agent will sometimes need to invent a good reason not to take drugs in the seller's presence, as by claiming that he is buying them for a girlfriend;¹⁸⁶ such a ploy obviously appeals

184. See *United States v. West*, 511 F.2d 1083, 1085 (3d Cir. 1975) (held, entrapment established as a matter of law under subjective test; court noted, *inter alia*, absence of prior narcotics activity); *People v. Sar-to*, 65 0.0.2d 353 (Mont. Co. Common Pleas 1973) (applying subjective test and noting, in support of judgment of acquittal, lack of proof that defendant had previously engaged in drug traffic). Compare *People v. Benford*, 53 Cal. 2d 1, 345 P.2d 928 (1959). Although California follows the subjective test, at the time of the *Benford* case it excluded evidence of prior convictions or prior criminal activity by the defendant. *Id.* at 11, 345 P.2d at 935. Therefore, in a case in which the prosecution adduced no evidence about prior criminal conduct, the court noted that the absence of such evidence could not aid the defendant in establishing a reasonable doubt about predisposition: "Since the prosecution in California cannot prove prior criminality of defendant to overcome the defense of entrapment, the absence of such evidence here does not in and of itself have the significance which it had under federal law in the *Sherman* case. [*Sherman v. United States*, 356 U.S. 369 (1958)]. . . ." *Id.* at 12, 345 P.2d at 936.

185. See text accompanying notes 128-55 *supra*.

186. "With the necessity of future transactions in mind, the undercover agent must be able to transport the narcotics away from the seller. Frequently the seller will demand that they be 'shot up' right there. The agent must explain that they are, for example, for his 'woman who is sick,' or for a 'friend who is "real bad" (trying to, but cannot "dry out").' Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. CHI. L. REV. 137, 156 (1963) (empirical study of crime detection by the Chicago police department).

to friendship. Even an agent posing as a drug dealer interested in purchasing large quantities runs some danger of seducing a user who does not normally sell drugs. The agent's indiscriminate eagerness to purchase large amounts may tempt a user into acting as a middleman because of the prospect of windfall profits.

The federal defense deals with the situations I have just described by inquiring whether the particular defendant was predisposed to commit the offense. Courts following the hypothetical-person test are more likely to give blanket approval to forms of persuasion that are reasonably needed for effective investigation, thereby permitting conviction of some nondisposed persons who were seduced into crimes which they otherwise would never have committed.

Any test that focuses solely upon the quality of the agent's conduct must necessarily allow agents substantial leeway. Agents cannot detect criminal activities unless they are able to go a certain distance in making appeals to friendship, sympathy, or personal gain. Since most targets will in fact be "wary criminals" instead of "unwary innocents," one may expect a judicial tendency to draw the line of decency at a point that requires the target to exercise a substantial amount of self-control.¹⁸⁷ But an inducement which is fair in the abstract may be unfair in a particular case, for reasons that are unknown to the agent and therefore do not affect the propriety of his conduct.

The proper role of a crime detection method that uses police agents to instigate offenses should be the detection of persons who are already involved in the type of criminal activity solicited by the agent. Instigation should not be used to induce crime by susceptible persons who are not already engaged in the criminal activity; and if such a person is caught in the net, he should be acquitted. The hypothetical-person approach creates a danger of conviction of such persons—persons who, because of individual circumstances or traits, are particularly susceptible to an inducement that the hypothetical person should be able to resist, but who are not, and might never be, regularly engaged in criminal activity. The federal test, properly defined and limited, holds a better chance of avoiding this consequence. Under the present

187. The Alaska supreme court may already have taken a step in this direction by requiring that the inducement be effective to cause an "average man" to commit the crime. See *Grossman v. State*, 457 P.2d 226 (Alas. 1969) (discussed in note 26 *supra* and accompanying text). The federal test has never required a defendant to exercise an "average" amount of self-restraint.

federal test, courts generally refuse to foreclose the entrapment defense even if the agent's inducements were very mild, so long as the defendant has presented some evidence of reluctance.¹⁸⁸ Defendants in such cases could not possibly hope for acquittal under a test that focused solely upon the nature of the inducement.

3. *Inaccuracy in Fact-finding*

One justification offered by the *Russell* majority for adhering to the subjective approach was that otherwise the prosecution would have no way to defeat an entrapment defense:

"Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offenses which consist of transactions that are carried on in secret."¹⁸⁹

This assertion, generated by Judge Learned Hand¹⁹⁰ and quoted in the majority opinions in both *Sherman* and *Russell*,¹⁹¹ is somewhat exaggerated. Under the doctrine advocated by the minorities in *Russell* and *Sherman*, the defendant is entitled to acquittal only if a police agent used improper inducement.¹⁹² If the defendant testifies that the agent offered such an inducement, the agent can take the stand and deny that he used any improper means.¹⁹³

The prosecution usually has an advantage in a swearing match between an agent and the typical defendant, particularly

188. See text accompanying notes 55-60 *supra*.

189. *United States v. Russell*, 411 U.S. 423, 434 (1973).

190. *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (Hand, J.).

191. 356 U.S. at 377 n.7; 411 U.S. at 434.

192. The recent proponents of hypothetical-person defenses have clearly indicated that the defense of entrapment cannot be sustained in the absence of overreaching conduct by agents. See *United States v. Russell*, 411 U.S. 423, 445 (1973) (Stewart, J., dissenting) (agents may offer opportunities for commission of crime; entrapment has occurred only if "their conduct is of a kind that could induce or instigate the commission of a crime by one not ready to and willing to commit it"); *Sherman v. United States*, 356 U.S. 369, 383-84 (Frankfurter, J., concurring) (agents may "act so as to detect those engaged in a criminal conduct and ready and willing to commit further crimes," but "in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others"); text accompanying notes 21-31 *supra* (describing Model Penal Code and its progeny).

193. However, there is one situation in which the hypothetical-person defense might create problems of proof for the prosecution. Often, particularly in drug cases, criminal activity is induced by an informer cooperating with the police in return for leniency. The informer may disappear, change his story, or prove to be less believable than the defend-

when the defendant has the burden of proof.¹⁹⁴ After all, the entrapment defense places the defendant in a rather unenviable position. Usually he must concede that he committed the criminal act.¹⁹⁵ In this posture, he must try to convince the fact-finder to believe his testimony that unfair inducements were used.

However, the fact that inducements are offered in secrecy creates another problem. The hypothetical-person approach has the undesirable effect of focusing the fact-finder's attention upon the factual issue least susceptible to reliable proof—the nature of the inducement offered to the defendant. Since inducements are offered in private, the finder of fact will often have to choose between the testimony of an informer who has a criminal record and that of a defendant who has admittedly committed a criminal act.¹⁹⁶ A decision based upon the demeanor of these two witnesses in the atmosphere of a trial is not likely to be very reliable.¹⁹⁷ Whether this circumstance favors the prosecution or the defense is unclear, but whichever the case, justice is not well served if the finder of fact must guess at the truth.

Admittedly, there will be conflicts in testimony under a test that focuses upon the defendant's predisposition instead of the agent's conduct, and in some cases evidence about predisposition will consist wholly of the uncorroborated testimony of an informer and a defendant. For example, the informer may claim that he merely requested drugs and that the defendant eagerly provided them, while the defendant may claim that the informer

ant. (Alternatively, the government may want to keep him off the stand in order to safeguard his undercover role, though a closed hearing, see note 338 *infra*, would ordinarily provide adequate protection.) In such cases the judge or jury may accept the defendant's story about the nature of the inducements. Under the federal test, such testimony could be overcome by evidence of predisposition, whereas under the hypothetical-person test, predisposition evidence must normally relate to the issue of the decency of the inducement, see text accompanying notes 119-53 *supra*, and there are forms of inducement which would not be justified whatever the target's predisposition.

194. Most formulations of the hypothetical-person defense place the burden of proof on the defendant. See notes 334-35 *infra*.

195. Normally a defendant must admit that he committed the criminal act to raise the entrapment defense. See note 308 *infra*.

196. One field study of entrapment in narcotics cases reported that the factual issues usually turned upon what happened during contacts between the informer and the defendant prior to the offense. TIFFANY, *supra* note 13, at 261. Although the author was referring to states that apparently followed the subjective test, the problem would be doubly troublesome in a hypothetical-person jurisdiction.

197. See Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 933-37 (1971), for discussion of the many reasons for doubting the value of demeanor as a guide to the truth.

pretended to be buying drugs for a girlfriend suffering withdrawal, and that he sold drugs from his own supply only after much coaxing. However, in other cases evidence about predisposition will be of a more reliable nature. For example, the prosecution may offer evidence of other crimes, possession of paraphernalia and quantities of contraband, the defendant's post-inducement admissions to reliable persons,¹⁹⁸ or the defendant's ability to procure large quantities of contraband on short notice. The defendant also has an opportunity to corroborate his defense with reliable evidence. For example, he might offer evidence that he was regularly employed at a full-time job and that he was living within his income.¹⁹⁹ More importantly, the defendant can point to the absence of evidence of prior crimes and argue that the government has failed to prove predisposition beyond a reasonable doubt²⁰⁰ because it failed to corroborate the testimony of its informer despite its opportunity to do so.²⁰¹ In short,

198. In drug cases, the initial solicitation of a sale is usually made by an informer instead of an undercover police officer. See note 226 *infra*. However, the informer is often told to try to get the target to sell drugs to an undercover police officer; such a sale is preferred to a sale to an informer because it provides more reliable proof that the defendant committed the criminal act. See Comment, *supra* note 186, at 154-55 (empirical study of practices of Chicago police department). In negotiating the sale or sales with the undercover officer, the defendant will frequently make statements indicating that he is a regular drug dealer. Cf. *Masciale v. United States*, 356 U.S. 386 (1958) (defendant bragged to undercover officers about knowing someone "high up in the narcotics traffic" and of his ability to procure heroin; *held*, jury entitled to disbelieve his otherwise uncontradicted testimony that he had been entrapped by an informer). Although undercover police officers sometimes give perjured testimony, the reliability of their testimony certainly seems to be greater than that of an informer who is trying to obtain leniency by acquiring convictions. Under the federal test, admissions to the undercover officer would be admissible; under the hypothetical-person test, the admissions would have no bearing on the issue of whether the informer had previously used unfair methods of inducement.

199. See, e.g., *United States v. West*, 511 F.2d 1083 (3d Cir. 1975) (*held*, government failed to meet its burden of production on issue of predisposition; fact that defendant, regularly employed as truck driver, had no prior history of drug dealing, and had been furnished drugs by government agent considered relevant); *United States v. Groessel*, 440 F.2d 602 (5th Cir. 1971) (fact that at time of crime defendant was employed as a fireman by the City of El Paso relevant to predisposition).

200. Under federal law, and the law of most other subjective-test jurisdictions, the government has the burden of persuasion beyond a reasonable doubt once the defendant has properly raised the entrapment defense. See notes 332-33 *infra* and accompanying text; cf. note 39 *supra* (standard entrapment instruction).

201. See text accompanying notes 182-85 *supra*.

the hypothetical-person test will often require the fact-finder to make an imponderable choice between the uncorroborated testimony of two unsavory witnesses; the federal test permits corroboration with relatively reliable evidence.

B. POTENTIAL BENEFITS

1. *Protecting the Purity of the Judicial System*

Members of the Supreme Court who have favored the hypothetical-person approach have seemed reluctant to state unequivocally that their goal is control of police conduct. Justice Roberts in *Sorrells* told the Court to maintain "the purity of its own temple"²⁰² without specifically mentioning the possibility that improper police conduct would be deterred. Justice Frankfurter in *Sherman* said that the "transcending value at stake" was "[p]ublic confidence in the fair and honorable administration of justice."²⁰³ Only incidentally did he allude in the final paragraph of his opinion to the desirability of providing "guidance for official conduct for the future,"²⁰⁴ Justice Douglas's dissent in *Russell* avoided specific mention of a deterrence rationale, saying only that the government agent involved had played a "debased role."²⁰⁵

These Justices were no doubt concerned about maintaining public respect for the criminal justice system. Yet the hypothetical-person approach is not an effective way to preserve this respect. Unless police conduct has been outrageous,²⁰⁶ it seems unlikely that the public will be offended by convictions of defendants who have been found—beyond a reasonable doubt and

202. *Sorrells v. United States*, 287 U.S. 435, 457 (1932) (separate opinion of Roberts, J.).

203. *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).

204. *Id.* at 385. Justice Frankfurter alluded to the desirability of guidance for official conduct in his argument that the entrapment issue should be determined by the trial judge rather than the jury; no statement of this nature appears in his description of the rationale of entrapment. *Id.* at 380 (discussion of rationale).

205. *United States v. Russell*, 411 U.S. 423, 439 (1973) (Douglas, J., dissenting). Cf. Sagarin & MacNamara, *The Problem of Entrapment*, 16 CRIME & DELIN. 363, 366 (1970): "On the moral level, it is argued that law itself and law enforcement should not be sullied. Law should be robbed in pristine purity, always serving as an example of righteousness to the people."

206. When police conduct has been outrageous, the due process clause should mandate acquittal in any case. See text accompanying notes 61-80 *supra*.

by a unanimous vote of twelve other citizens—to be ready and willing to commit the crime charged. It is more likely that the judiciary will lose respect by embracing an entrapment defense that ignores culpability and seeks to control police conduct by acquittal of professional criminals.

The quoted passages may also reflect the judgment that “purity” is an end in itself—one which should be pursued regardless of collateral effects upon public respect or police conduct. This judgment is, of course, impervious to rational criticism—neither logic nor fact can prevail against an assertion that a consequence is evil because it is “impure” or “ignoble.” All one can do is record disagreement with a doctrine that, without any expectation of affecting police conduct, pursues “purity” by putting aside the guilt or innocence of the person on trial and asking whether police conduct might have tempted a hypothetical person.

2. *Preventing Police Misconduct*

a. The feasibility of prevention

As might be expected, a number of advocates of the hypothetical-person defense have not been content to rest upon a “purity” rationale, but have argued that the defense will serve to prevent police misconduct.²⁰⁷ The commentaries to the Model Penal Code and the Brown Commission proposal both take this position.²⁰⁸

If rules about entrapment are to have a substantial deterrent effect upon government misconduct, it appears that the following conditions ought to be fulfilled:

1. The rules should be articulated with enough clarity and detail to serve as a practical guide in the investigation of crime;
2. The rules should be communicated to and understood by the persons engaged in the frontline detection of crime;
3. The sanction (acquittal of the target) should be both certain enough and severe enough to ensure observation of the rules:

207. See authorities cited in note 135 *supra*; cf. *United States v. Russell*, 411 U.S. 423, 447 (1973) (Stewart, J., dissenting) (“the agent’s undertaking to supply this ingredient . . . was, I think, precisely the type of governmental conduct that the entrapment defense is meant to prevent”).

208. See note 135 *supra*.

a. In order for the sanction to be *certain*, officers and informers who have violated the rules must be willing to testify truthfully about the violation, or the fact-finder must be in a position to separate truth from perjury reliably; and

b. In order for the sanction to be sufficiently *severe*, persons engaged in the control of crime must place a reasonably high value upon the conviction of entrapment targets (as opposed to some other goal, such as confiscation of contraband or a high arrest record) and must perceive an acquittal as a form of punishment for their misconduct.²⁰⁹

(1) Feasibility of clear, detailed rules

The present formulations of the hypothetical-person test do not provide much guidance to officers and informers. They merely tell agents not to offer inducements that would tempt a law-abiding hypothetical person. Of course, the vagueness of this general standard does not necessarily preclude the possibility that case law will yield, over a period of time, a collection of clear, detailed rules. With this possibility in mind, supporters of the hypothetical-person test usually advocate that the defense of entrapment be tried before the judge instead of the jury, so that a set of detailed standards can develop as judges write opinions dealing with specific fact situations.²¹⁰

Even with time and experience, development of detailed rules will probably prove to be quite difficult. Nothing as clear and understandable as the *Miranda* rule,²¹¹ which can be satisfied

209. For a similar list of factors necessary for the successful operation of the exclusionary rule in search and seizure cases, see LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 Mo. L. Rev. 391, 395 (1965):

For the exclusionary rule to be completely effective . . . it would seem necessary: (a) that the requirements of the law on arrest, search and seizure, and in-custody investigation be developed in some detail and in a manner sufficiently responsive to both the practical needs of enforcement and the individual right of privacy; (b) that these requirements be fashioned in a manner understandable by the front-line lower-echelon police officer and that they be effectively communicated to him; and (c) that the police desire to obtain convictions be sufficiently great to induce them to comply with these requirements.

See also LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1003 (1965); cf. Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 960-70 (1966) (describing conditions which influence the preventive effect of criminal penalties).

210. See text accompanying notes 341-43 *infra*.

211. See *Miranda v. Arizona*, 384 U.S. 486 (1969).

by form warnings about constitutional rights, can reasonably be expected. Once the subject is in custody, rigid per se rules about matters such as interrogation can be formulated, since it is feasible to treat all defendants in a similar fashion. However, it is much more difficult to establish standardized procedures for the delicate process of investigation and detection. Officers and informers need to be able to respond differently to the multifarious situations with which they will be presented.

The difficulty of developing clear per se rules can be illustrated by considering specific techniques of inducement which might be prohibited. Among the inducements that have frequently been criticized are appeals to sympathy or friendship, offers of inordinate gain, and repeated solicitation of criminal activity after a target has initially refused.²¹² These inducements cannot be outlawed as a class without jeopardizing legitimate detection.²¹³ An appeal to friendship that causes an obviously reluctant person to sell a small amount of drugs is reprehensible; a similar appeal to a corrupt public official by an informer may be justifiable, particularly if the target's reluctance is expressly based upon considerations of expediency, and his methods of operation preclude approach except through friends. Similarly, an offer above the black market price for drugs would be inexcusable when used to induce an addict to sell a small amount,

212. Justice Frankfurter condemned "[a]ppeals to sympathy, friendship, the possibility of exorbitant gain, and so forth." *Sherman v. United States*, 356 U.S. 369, 383 (1958) (concurring opinion). Professor Donnelly made a similar list of forbidden tactics, saying that "if the officer uses inducements that would reasonably overcome the resistance of one not a chronic offender, such as pleas of desperate illness, continued and persistent coaxing, appeals to sympathy, pity, or friendship, or offers of inordinate sums of money, the court should find as a matter of law that there was entrapment." Donnelly, *supra* note 13, at 1114. Compare examples of forbidden conduct described in note 213 *infra*.

213. The leading hypothetical-person cases have so far shown no inclination to endorse blanket prohibitions of classes of inducement. *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973), simply described the complicated factual situation before it and stated that under the circumstances an entrapment had been committed. *Grossman v. State*, 457 P.2d 226 (Alas. 1969), and *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974), attempted to provide somewhat more explicit guidance, but used carefully hedged language. *Grossman* stated:

Examples of what might constitute prohibited activity, depending upon an evaluation of the facts in each case, are extreme pleas of desperate illness, appeals based primarily on sympathy, pity, or close personal friendship, and offers of inordinate sums of money.

457 P.2d at 230 (emphasis added). *State v. Mullen* contained a virtually identical passage. 216 N.W.2d at 383.

but might be justifiable if agents were negotiating a \$100,000 purchase. Examples could be multiplied indefinitely.²¹⁴

There is another objection to creation of *per se* rules in entrapment cases. The rules would have to be disseminated to frontline police officers and to criminals acting as police agents. If an effort to educate these persons succeeded, the rules would also become known to potential targets. Thus a person involved in a criminal enterprise could attempt to immunize himself by requiring a suspected agent to break one of the rules during the negotiations leading to an offense. For example, if agents were prohibited from persisting after an initial refusal, a drug dealer could simply refuse to sell to new customers on first request. Ironically, professional criminals are the ones most likely to be sophisticated enough to take such precautions.

There is some evidence that offenders have already used such tactics where fixed restrictions have been placed upon methods of solicitation. For example, police in one western city had a policy of never allowing a prostitute to touch them, and of never "setting the price." Consequently prostitutes would seek to discover whether a customer was an officer by attempting to kiss him, or by asking him how much he would pay.²¹⁵ Narcotics sellers sometimes take similar precautions, as by requiring potential buyers to use narcotics in the seller's presence.²¹⁶

Admittedly, it would be naive to suppose that drug dealers would be able to immunize themselves simply because an appellate court placed fixed restrictions upon methods of solicitation. However, this prospect is unrealistic only because many agents would not abide by the restrictions. They would use the means necessary to induce a sale, and then give false testimony at trial. Surely that is not a desirable result.

The sea of troubles that has attended the development of rules governing police searches has led many critics to question

214. For example, supplying contraband to a target for resale is normally unjustifiable, but should be permitted when the agent is acting as a supposed courier in a criminal enterprise organized by others. See text accompanying notes 86-103 *supra*. Supplying means necessary for a crime—a boat for smuggling, a chemical for drug manufacture, a plate for counterfeiting—is normally improper, but may not be so if the agent is attempting to establish his credibility with a large criminal enterprise. Cf. text accompanying notes 71-85 *supra*.

215. See J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 103 (1966).

216. TIFFANY, *supra* note 13, at 252.

the value of the exclusionary rules in search and seizure cases.²¹⁷ These troubles will also impede the development of appropriate rules by courts administering the hypothetical-person defense. Like the exclusionary rule in search cases, this approach to the entrapment defense presents courts with the formidable task of formulating a general code designed to influence police conduct. This code must be formulated without adequate empirical data about the nature of police practices, the need for them, or the effect of judicial decisions upon them. The question posed by the federal entrapment defense—the culpability of the defendant at bar—is much better suited for case-by-case determination.

(2) Communication and understanding of the rules

Another obstacle to the use of entrapment doctrine to control the conduct of agents is the problem of communicating the rules to their addressees. Much has been written about the difficulty of teaching police officers about search and seizure rules. Lower-court judges often fail to explain clearly their reasons for suppressing evidence,²¹⁸ and dissemination of information by prosecutors and police supervisors has been very spotty.²¹⁹ Formal police training about search and seizure has been inadequate.²²⁰ The difficulty of attracting intelligent and competent recruits has also been a pervasive obstacle to adequate understanding of appellate court doctrine.²²¹ This problem has been compounded by the fact that many important police decisions—when to search, when to arrest, how to deal with informers—are left to lower level police officers without much guidance from police superintendants or other higher officials.²²²

These problems seem petty when compared with the problems of educating agents about rules of entrapment. Entrap-

217. See Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964); Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DE PAUL L. REV. 80 (1969); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951-53 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 754-57 (1970); cf. LaFave, *Improving Police Performance Through the Exclusionary Rule* (pts. I & II), 30 MO. L. REV. 391, 566 (1965).

218. See LaFave, *supra* note 217, at 402-03; LaFave & Remington, *supra* note 209, at 1005.

219. See LaFave, *supra* note 217, at 415-21, 593-607; LaFave & Remington, *supra* note 209, at 1005; Oaks, *supra* note 217, at 730-31; cf. K.C. DAVIS, *POLICE DISCRETION* 9-12 (1975).

220. See LaFave, *supra* note 217, at 593-607; LaFave & Remington, *supra* note 209, at 1007.

221. See LaFave, *supra* note 217, at 607-08.

222. See K.C. DAVIS, *POLICE DISCRETION* 32-52 (1975).

ment rules are addressed to situations in which an agent has solicited the commission of an offense. Investigation by solicitation of offenses is used almost exclusively in the detection of consensual crimes. Probably the crime most commonly investigated by this method is drug trafficking. (In the period 1970-74, 65 percent of the 405 reported federal entrapment decisions involved drug offenses.²²³) Investigation of drug trafficking requires use of informers with contacts in the drug culture; drug sellers are not "pushers" who prowl around looking for new customers.²²⁴ It

223. The 405 federal entrapment opinions rendered between January 1, 1970, and January 1, 1975, fell into the following categories:

Drug offenses (excluding alcohol)	65%
Alcohol offenses	6%
Bribery, government corruption	6%
Counterfeiting	7%
Firearms offenses (transportation, sale)	7%
Other offenses	9%

The 405 entrapment cases were obtained by a computer-aided search, using the LEXIS system, of a data base containing the full text of all reported federal cases in the five-year period. The computer retrieved all cases containing the word "entrapment" or any other word beginning with the root "entrap." The 550 cases retrieved were read and classified. All cases in which a criminal defendant sought relief from conviction or prosecution on grounds of entrapment were classified as entrapment cases. Under this criteria, 145 of the 550 cases were discarded on grounds that they were not entrapment cases. The computer retrieved only cases in which opinions were delivered either by trial or appellate judges; entrapment cases (including jury acquittals) that did not elicit an opinion were not contained in the data base.

Because of the limited nature of federal criminal jurisdiction, it seems probable that the entrapment defense arises in a wider variety of contexts in state criminal prosecutions. For example, entrapment is probably raised fairly frequently at the trial level in cases involving prostitution, homosexuality, and other consensual sexual crimes. See TIFFANY, *supra* note 13, at 214-39; Note, *Decoy Enforcement of Homosexual Laws*, 112 U. PA. L. REV. 259 (1963). However, an identical computer-aided review of New York and Ohio entrapment cases in the same five-year period indicated that a majority (13 of 25) of the cases eliciting opinions involved drug offenses. Moreover, the entrapment doctrine is less important in cases involving minor vice crimes than in cases involving drug sales. Charges such as prostitution and homosexual solicitation are likely to be disposed of in the lowest level of criminal court—often in courts that are not even courts of record. In deciding whether to acquit or dismiss, judges in these courts may be influenced more by a general weighing of the equities than by appellate court doctrine. See TIFFANY, *supra* note 13, at 224-26 (prostitution cases). See generally J. ROBERTSON, *ROUGH JUSTICE* (1974).

I am grateful to Pauline Bouchard, a third-year student at the University of Minnesota Law School, for compiling the information contained in this footnote and in note 44 *supra*.

224. See Wilson, Moore, & Wheat, *The Problem of Heroin*, PUB. INT., Fall 1972, at 1, 10-12 (notes that research studies show that peer group friends introduce novices to drugs; drug dealers do not risk "missionary work").

is therefore impracticable for an officer to buy drugs by simply approaching a seller and asking for them.²²⁵ Instead, informers with contacts in the drug culture must be used for the initial solicitation. In fact, the great majority of drug cases are "made" through the use of informer-solicitors.²²⁶ These informers are commonly drug offenders who have been promised leniency in return for cooperation.²²⁷

It has been said that "[p]olice departments seldom employ policemen as such. They employ the best available men and then try to make policemen of them. . . . This is a burden borne by no other professional discipline."²²⁸ In drug cases, it would be more accurate to say that the worst available are chosen and then turned into quasi-policemen. The problem of educating the addressees of entrapment doctrine will be one of teaching police officers to be educators. In order for the hypothetical-person test to be effective, officers must teach their informers the intricacies of appellate court doctrine.

(3) Certainty and severity of the sanction of acquittal

The question whether the sanction of acquittal is severe

225. It is impossible for a policeman or a narcotics agent, even though not in uniform, to make contact with the underworld and make a "buy" without using an informer or undercover agent as a decoy. A narcotics pusher, retailer or wholesaler . . . would no more sell to any one of the approximately 285 federal narcotics agents in this country than he would be foolish enough to sell directly to a police commissioner. . . . An informer may pose as an addict or as a dealer in narcotics. Federal narcotics arrests are generally based on an original introduction by an informer to either a user or supplier and are usually made only after two or more sales.

Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 *FORDHAM L. REV.* 399, 403 (1960).

A field study of the Chicago police department reported that narcotics officers preferred, for evidentiary purposes, to make purchases themselves. However, they usually had to be satisfied with observing purchases by informers. See Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 *U. CHI. L. REV.* 132, 154-55 (1963). See also TIFFANY, *supra* note 13, at 254-56.

226. One source has estimated that 90 percent of the solicitation of drug sales is done by private individuals acting for the police rather than by undercover police officers. See TIFFANY, *supra* note 13, at 252.

227. *Id.* at 253. See also K.C. DAVIS, *POLICE DISCRETION* 28-31 (1975). For examples of cases in which the informer was charged with a drug crime at the time he induced the defendant's crime, see *Sherman v. United States*, 356 U.S. 369, 374 (1958); *United States v. Lauer*, 287 F.2d 633 (7th Cir.), *cert. denied*, 368 U.S. 818 (1961).

228. Gourley, *State Standards for Local Police Recruitment and Training*, 53 *J. CRIM. L.C. & P.S.* 522, 524-25 (1962) (emphasis omitted).

enough to deter officers and informers from entrapment is a matter about which little empirical evidence is available. In the search and seizure context, some commentators have suggested that the acquittal sanction is not severe, since police have goals other than conviction. They may seek to suppress vice simply by making arrests. Arrest in itself is a substantial punishment, particularly if the defendant must remain in jail pending trial. Also, aggressive searches and frisks may in themselves manifest authority and serve certain police goals.²²⁹

One can only guess at the degree to which similar considerations apply in entrapment cases. In the case of some vice crimes, harassment and disruption of the illegal activity can become a more important goal than conviction of offenders.²³⁰ Where that occurs, acquittal of targets would have little deterrent effect, since harassment and disruption can be accomplished by arrest without conviction. However, police regard sale of narcotics as a serious offense, and probably most arrests for this crime are made for the purpose of obtaining convictions.²³¹ Therefore, acquittal would be regarded as a significant punishment.²³²

Whatever the severity of the sanction of acquittal, it will have little effect if it is not applied with a fair degree of certainty. If the entrapment doctrine is to succeed in deterring im-

229. J. SKOLNICK, *supra* note 215, at 219-25; LaFave, *supra* note 217, at 421-47; LaFave & Remington, *supra* note 209, at 1010-11; Oaks, *supra* note 217, at 720-24.

230. See LaFave, *supra* note 217, at 447-52; LaFave & Remington, *supra* note 209, at 1010-11:

Despite the current difficulty in convicting ordinary gamblers, public and institutional pressures for police action continue. The result often is a program of searches and arrests without any thought of prosecution or conviction. Such a program serves some purposes which police may feel are advantageous to law enforcement: offenders are subjected to at least a brief period of incarceration; they must spend money to gain their release or to terminate the proceedings; any gambling paraphernalia or gambling funds will be seized; there are costs attendant upon the interruption and relocation of the criminal operation; and certain property used in the illegal business may be subjected to forfeiture. Where these results have replaced conviction as an objective of police action, it is not unusual for the police to become even less selective in deciding whom to arrest or search. [footnotes omitted]

231. "Police do not consider harassment of the narcotics seller to be an adequate response, as narcotics sale is such a serious offense. Instead, police enforcement is intended to bring about the arrest, prosecution, and conviction of the seller of narcotics, with the expectation that he will be given a substantial prison sentence." TIFFANY, *supra* note 13, at 264.

232. Acquittal may also be a very serious sanction for the informer-entrappor if he is denied leniency in the case pending against him on grounds that he did not obtain a conviction.

proper governmental conduct, courts must identify cases in which entrapment has occurred and separate them from those in which it has not. There is substantial evidence that the exclusionary rule in search and seizure cases is being partially defeated by police perjury.²³³ This problem will be doubly or triply present in entrapment cases.

Consider the paradigm versions of the hypothetical-person test promulgated by the Model Penal Code and the Brown Commission proposal. By concentrating on the nature of the inducement rather than the defendant's predisposition, both focus the fact-finding process upon exactly the factual transaction which is least susceptible to reliable proof—the secret transactions between the informer (usually a criminal who must produce results in order to obtain leniency) and the defendant.²³⁴ The fact-finder will be faced with the problem of resolving, primarily on the basis of demeanor evidence, the inconsistencies between the testimony of these two parties.²³⁵ The goal of the test is to punish agents who have used improper inducements, but an agent who has used an improper inducement is likely to lie about what he did. Even a relatively conscientious police officer may lie if he perceives that otherwise a hardened criminal will escape on a "technicality."²³⁶ It is difficult to imagine a less reliable fact-finding process. By contrast, the federal test permits consideration of a broader range of evidence, including relatively reliable circumstantial evidence.²³⁷ Moreover, police officers will have more incentive to tell the truth, since a habitual criminal will not escape punishment merely because persuasive inducements were used. Indeed, it is possible that, because of its appeal to the consciences of police officers, the federal test has as much preventive effect as would the hypothetical-person approach.²³⁸

233. See Younger, *Constitutional Protection on Search and Seizure Dead?*, TRIAL, Aug.-Sept. 1967, at 41, reprinted in F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, *CRIMINAL JUSTICE ADMINISTRATION* 272-73 (1969) (description of perjured "dropsie" testimony in narcotics cases); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & Soc. PROB. 87, 94-96 (1968) (study describing dramatic increase in "dropsie" testimony after exclusionary rule applied to states); Comment, *The Outwardly Sufficient Search Warrant Affidavit: What If It's False?*, 19 U.C.L.A.L. REV. 96, 111-12 & nn.58-60 (1971); cf. J. SKOLNICK, *supra* note 215, at 211-29 (1966).

234. See text accompanying notes 223-27 *supra*.

235. See text accompanying notes 196-97 *supra*.

236. See note 233 *supra* and accompanying text.

237. See text accompanying notes 119-125 *supra*.

238. A rule's deterrent effect will partly depend upon whether it ap-

b. Goals of prevention

There are many reasons to doubt that the hypothetical-person defense will have a substantial effect upon the conduct of government agents. However, even if such an effect were achieved, one would still need to ask whether it justified acquitting habitual offenders and convicting nondisposed persons. In balancing the benefits and detriments of the defense, one must ask exactly what evils it seeks to prevent.

Perhaps it is best to begin by emphasizing the narrow scope of the hypothetical-person defense. The defense only restricts the type of inducements that police agents may offer. It does not prevent police from sending undercover agents to spy on private conduct or to infiltrate political organizations. It does not prevent these spies from pretending friendship in order to gather information. These activities, with their detrimental effects on privacy and trust, will continue under either version of the entrapment defense. Moreover, the hypothetical-person defense will not prevent an agent from merely asking an apparently law-abiding person to commit a crime, so long as no undue pressure is applied. Thus, an undercover agent may enter a drugstore and ask a pharmacist to give him dextedrine without a prescription, even if he is on a fishing expedition and intends to visit every drugstore in town. The defense is only concerned with preventing the use of overly persuasive inducements.²³⁹

peals to the sense of moral obligation of its addressees. See Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 956-59 (1966). For example, police officers who would regard the "framing" of an innocent person as morally abhorrent are willing to circumvent search and seizure rules because these rules are regarded as bothersome technicalities. Cf. Oaks, *supra* note 217, at 729. An entrapment defense designed to exonerate nondisposed persons might be expected to have greater appeal than a rule which condemns police conduct because it might have tempted a hypothetical person.

239. Presence or absence of reasonable suspicion may be one factor to consider in determining whether the application of pressure by the agent was justifiable, see BROWN COMMISSION COMMENTARY, *supra* note 13, at 322-23, but a random spot-check in the situation described in text would not be forbidden, since the agent has exerted no pressure which might cause a hypothetical law-abiding person to commit the offense. The defendant would not qualify under either the Model Penal Code or the Brown Commission version of the defense. See note 17 *supra*.

A number of commentators have argued that solicitation of crime should never be permitted unless the agent has reasonable grounds to suspect that his target is engaged in crime. See authorities cited in note 18 *supra*. This "reasonable suspicion" defense deserves consideration, since it might reduce intrusive undercover work. However, in order to gather evidence that a target was committing a consensual crime, it will often be necessary either to elicit incriminating evidence from friends of

Several consequences may flow from the use of overly persuasive inducements. First, they can offend innocent persons who resist them and refuse to commit the crime. If the defense is intended to protect such persons, it is analogous to the prophylactic use of the exclusionary rule in search and seizure cases. However, the harm done by an illegal search is greater. A search involves an invasion of privacy, often accompanied by a tense encounter with police officers and, as in the case of a body search, an affront to personal dignity. A person who has merely been subjected to solicitations accompanied by appeals to friendship, pleas for sympathy, or promises of inordinate gain has not been harmed nearly so much. The harm done would be comparable if a request were accompanied by threats or some other form of extreme coercion, but it seems unlikely that agents have more incentive to use such tactics under the federal defense than they would have under the hypothetical-person defense. Except in very unusual circumstances, a defendant who yielded to threats or coercion could not be found beyond a reasonable doubt to have been predisposed to commit the crime. Moreover, the due process clause probably requires acquittal of a person subjected to such tactics regardless of predisposition.²⁴⁰

Second, the use of an overly persuasive inducement might cause the commission of crime by a predisposed person who was awaiting any favorable opportunity to commit the offense. It is doubtful that the hypothetical-person defense is designed to protect such persons, though it will incidentally (and regrettably) have that effect. The use of an inducement that might persuade a nondisposed person is not in itself cruel, and the discovery of persons already engaged (or about to engage) in criminal activity is a gain rather than a loss.

Third, the use of an overly persuasive inducement might cause the commission of crime by a normally law-abiding person

the target, instruct undercover agents to make friends with him, or place him under surveillance. These activities are almost as intrusive as solicitation of crime. In some instances they would be more so. Sending agents to make friends with a druggist in order to find grounds for suspecting that he was illegally selling drugs would be a greater invasion of privacy than sending a stranger to make an unadorned request for drugs. Moreover, the reasonable suspicion defense has many of the weaknesses of the hypothetical-person defense: Development of detailed rules that provided clear guidance to police agents would be difficult; enforcement could be stymied by fabricated testimony; and the defense would sometimes lead to the acquittal of dangerous offenders.

240. See text accompanying note 68 *supra*.

who will, when the issue is presented, erroneously be found to have been predisposed. For example, a jury may give too much weight to evidence of past offenses, thereby returning a guilty verdict against an ex-convict who was trying to reform. Advocates of the hypothetical-person approach have repeatedly voiced concern about this possibility. As Justice Frankfurter said in his concurring opinion in the *Sherman* case:

Appeals to sympathy, friendship, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view.²⁴¹

The commentary to the Brown Commission proposal even suggests that providing additional protection to "habitual criminals" would be the principal impact of its proposed change in federal law:

The entrapment defense, as presently recognized in the Federal courts, has been found not to be "a significant limitation upon police encouragement practices." The proposed statute is not expected to exert any more restraints upon police law enforcement procedures than does the present law. Yet, it is also true that the proposed statute might require more cautious behavior on the part of law enforcement personnel when dealing with habitual criminals than is presently the case. This is so because the predisposition of the defendant is not of crucial concern in the proposed statute whereas the present law requires a lack of predisposition as a condition precedent to an entrapment. . . .

One of the most serious shortcomings of the present entrapment law is that the predisposition element tends to encourage or tempt law enforcement into a "devil-may-care" or "anything goes" attitude toward persons of a known criminal reputation²⁴²

Even if the quoted passages are correct in their assumptions about police conduct,²⁴³ the concerns voiced do not mandate ac-

241. *Sherman v. United States*, 356 U.S. 369, 383 (1958). See also MODEL PENAL CODE § 2.08, Comment at 4 (Tent. Draft No. 9, 1959).

242. BROWN COMMISSION COMMENTARY, *supra* note 13, at 306.

243. There is doubt about whether agents actually pursue persons with past records more vigorously than others. See text accompanying notes 316-17 *infra*.

ceptance of the hypothetical-person approach. It may be more realistic to admit that the "ameliorative hopes of modern penology" have not been realized, and to hope that pursuit of past offenders will have a deterrent effect instead of a criminogenic one.²⁴⁴ At any rate, one need not embrace the hypothetical-person defense in order to protect past offenders from overzealous pursuit by police officers who believe that the entrapment defense can be defeated merely by evidence about reputation or prior convictions. Sufficient protection could be provided by adopting a version of the federal approach that excluded evidence of past convictions and criminal reputation from the factfinder's consideration. Exclusion of such evidence would still leave the government with ample means to prove predisposition.²⁴⁵

With this procedural alteration, the federal test would provide greater protection against conviction of law-abiding former offenders than would the hypothetical-person test. The federal test protects such persons against conviction even if the inducements offered were relatively mild, while the hypothetical-person test protects only persons who have been subjected to pressure so obnoxious that courts are willing to condemn its use in all circumstances. Moreover, by permitting broad-ranging evidence of predisposition to come in, the federal test allows a defendant to introduce affirmative evidence that he was law-abiding or to rely upon the prosecution's failure to adduce evidence of criminal propensity as raising a reasonable doubt.²⁴⁶

c. The need for prevention

Obviously, the frequency with which police agents use improper inducements ought to be considered in deciding whether to adopt an approach that attempts to control their conduct. Although the available data is tentative and incomplete, it suggests that the use of overreaching inducements is probably not a common practice.

Studies of police behavior have turned up evidence of corruption, brutality, and violations of constitutional rights,²⁴⁷ but

244. See text accompanying note 318 *infra*.

245. For examples of ways the government could prove predisposition, see text accompanying notes 119-25 *supra*.

246. See text accompanying note 184 *supra*.

247. See generally COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES, THE KNAPP

have not found comparable evidence of entrapment. Jerome Skolnick discovered that narcotics officers frequently violated search and seizure rules²⁴⁸ and that they sometimes allowed informers to commit crimes as payment for their services,²⁴⁹ but he apparently did not observe any instances of entrapment worth reporting.²⁵⁰ Two other field studies that directly focused upon entrapment did not uncover evidence that police agents were using overreaching methods of persuasion with any frequency. The first of these, a study of narcotics enforcement in Chicago, reported finding "[a]n extremely low incidence of police conduct which might qualify as entrapment . . . a situation which would still exist even if appellate doctrine were more exacting."²⁵¹ The second, a study of detection of consensual crimes in Michigan, Kansas, and Wisconsin, suggested that informers in narcotics cases might be willing to apply undue pressure, but concluded that "[i]t is difficult to know whether the use of improper encouragement methods by agents constitutes a serious problem, because the conduct of agents at this stage of the process is usually not observed."²⁵²

COMMISSION REPORT ON POLICE CORRUPTION (1973); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967); J. SKOLNICK, *supra* note 215. See also Oaks, *supra* note 217; authorities cited in note 233 *supra*.

248. J. SKOLNICK, *supra* note 215, at 139-61.

249. *Id.* at 129.

250. Although Skolnick examined narcotics enforcement at length, *id.* at 112-64, he reported no instances of overreaching inducement. His only mention of entrapment occurs in a discussion of prostitution enforcement, where he reported police concern over the trickery attending the use of decoys but no instances of conduct which would qualify as entrapment. *Id.* at 103. This police attitude contrasted sharply with attitudes toward search and seizure rules; the police admitted violations of those rules and advanced justifications for refusing to follow them. *Id.* at 144-45.

251. Comment, *supra* note 225, at 161.

252. TIFFANY, *supra* note 13, at 254-55.

Professor Rotenberg, the author of the quoted passage, also studied enforcement of liquor laws against prostitution and homosexuality, apparently without observing any significant use of improper inducements. See *id.* at 231-39 (homosexuality), *id.* at 240-49 (liquor); *id.* at 214-30 (prostitution). With regard to prostitution, he reported: "The issue [entrapment] seldom arises at the trial court level because police do not feel that there is any practical necessity for the use of methods which are likely to constitute entrapment as it has been defined by appellate courts." *Id.* at 224. Although this passage might be read as a comment on the inadequacy of appellate court doctrine rather than the purity of police practices, the description of prostitution enforcement contained in the remainder of the section indicates that the police did not find it necessary to apply undue pressure. See, e.g., *id.* at 221:

The requirement that reality be simulated not only significantly

The results of armchair speculation about the frequency of misconduct are inconclusive. On the one hand, informers who are cooperating in return for leniency are likely to be unscrupulous. To save themselves, many would be willing to seduce a nondisposed target. On the other hand, informers are likely to find that hard-sell persuasion does not work. A desperate appeal may produce suspicion rather than pity. Even the offer of "inordinate gain" may not be an effective inducement. A seller of drugs is more likely to trust someone who haggles over the price than someone who makes an overgenerous offer.

Informers normally have contacts within a criminal subculture. They are acquainted with persons who are dealing in drugs or committing other vice crimes. They have little reason to engage in a campaign to seduce an obviously reluctant person when easier pickings are available. Even if an informer succeeds in badgering a nondisposed person into committing an offense, it is unlikely that a "high quality" arrest will ensue.²⁵³

Admittedly, the available evidence is inconclusive. It may be that the problem is under control, or that it is inherently self-controlling because use of undue pressure is counterproductive. If so, the federal version of the defense is clearly preferable. In the absence of an overriding need to control police conduct, the goal of a criminal trial should be to administer justice to the defendant at bar.

On the other hand, it is possible that agents frequently use inducements that would tempt a nondisposed person. Even so, the detriments of the hypothetical-person defense probably outweigh its benefits. It is unlikely that conduct of informers and officers can be controlled effectively by use of the hypothetical-person defense. Moreover, the benefits to be gained by preventing overreaching inducements probably would not outweigh the injustice created by acquittal of chronic offenders and conviction of nondisposed persons.

affects the encouragement method itself but also affects its limits. Thus, an officer who is in plain clothes and driving an unmarked car will stop his car late at night at a corner where a woman is standing alone, but he will not do anything more if the woman does not approach the car. The reason is that the real prostitute requires no more encouragement than that.

253. A "high quality" arrest is an arrest for a serious crime, such as sale of a substantial quantity of drugs. In drug cases, officials have become increasingly less interested in arresting mere users and seller-users. This development has probably decreased the incentive informers may have had to apply undue pressure to induce users to make sales.

IV. AN APOLOGIA FOR THE FEDERAL DEFENSE

A. THE PRIVATE-PERSON EXCEPTION

The federal defense seeks to excuse nondisposed defendants who would have refrained from crime but for temptations offered by government agents. Judicial opinions supporting this approach have not attempted to describe elaborately the rationale for exonerating such persons, perhaps because it seems obvious that they are less blameworthy and less dangerous than the ordinary offender. Since they are less blameworthy, they are less deserving of retributive punishment; since they are less dangerous, the need for protection of society by prison or probation supervision is diminished.

Critics of the federal defense have argued that this rationale cannot support it, since courts applying it have universally declined to permit the defense to be raised in cases where an "entrapment" was accomplished by a private person rather than a government agent.²⁵⁴ As the Model Penal Code commentary points out, defendants entrapped by government agents are "neither less reprehensible or dangerous nor more reformable or deterrable" than defendants who have been led astray by private persons.²⁵⁵ Therefore, the argument runs, it is illogical to say that the entrapment defense is based upon a concern for protecting "innocent" persons.²⁵⁶

254. For examples of federal cases recognizing the private person exception, see *Holloway v. United States*, 432 F.2d 775, 776 (10th Cir. 1970); *Carbajal-Portillo v. United States*, 396 F.2d 944, 947-48 (9th Cir. 1968); *Henderson v. United States*, 237 F.2d 169 (5th Cir. 1956).

255. See MODEL PENAL CODE § 2.10, Comment at 14 (Tent. Draft No. 9, 1959).

256. The scholarly examinations of the defense of entrapment have . . . revealed the inadequacies of the subjective test. To speak of entrapment as an implied statutory condition, and then to focus inquiry on the origin of intent, the implantation of criminal design, and the predisposition of the defendant does not make much sense. If entrapment is a substantive condition of guilt, then it ought to apply when private persons induce the commission of an offense. But no court has ever been willing to make such an application of the *Sorrells* doctrine. An external standard, if it can be achieved, is certainly preferable to a doctrine founded in theoretical riddles.

Grossman v. State, 457 P.2d 226, 229 (Alas. 1969). For similar statements, see *United States v. Russell*, 411 U.S. 423, 442 (1973) (Stewart, J., dissenting); *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); *State v. Mullen*, 216 N.W.2d 375, 378 (Iowa 1974); Donnelly, *supra* note 13, at 1109 ("If the genesis of intent formula is to be taken seriously, why limit entrapment to instigation by government agents?"); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 898 (1963).

This argument is based upon two related fallacies:

(1) The notion that, since the entrapment defense sometimes treats persons of equal culpability differently, it therefore cannot be concerned about culpability; and

(2) The notion that the entrapment defense must have one aim and only one.

The first notion fails to recognize that rules intended to excuse nonculpable persons from criminal liability must sometimes be limited in scope because of the danger of contrived defenses. The defense of mistake of law is one example of a defense that, though intended to protect innocent persons, has been curtailed for this reason. There, as in the case of entrapment, it would sometimes be just to relieve a defendant of criminal liability even if he intentionally committed a forbidden act. If the crime was *malum prohibitum* and the defendant diligently made efforts to determine whether his conduct would be legal, then he is neither blameworthy nor dangerous. However, he may still be subject to criminal punishment. In fact, the Model Penal Code would not exonerate such a defendant unless his mistaken belief was based upon the advice of a public official.²⁵⁷

A person who relied upon the advice of private counsel may have acted just as diligently and honestly as a person who relied upon the advice of a public official. Why this distinction between persons of equal culpability, when one is "neither less reprehensible or dangerous nor more reformable or deterrable" than the other? The distinction does not mean that the defense of mistake of law is not really concerned with culpability, or that it must be intended to deter wrongful conduct on the part of public officials. It reflects recognition of the possibility of contriving the defense with the help of a venal lawyer. Accordingly, the commentary to the Model Penal Code states that the draftsmen limited the mistake of law defense to situations "where the possibility of collusion is minimal" and where "a judicial determination of the reasonableness of the belief in legality should not present substantial difficulty."²⁵⁸

The private-person exception to the entrapment defense is analogous. If entrapment by private persons were a defense, there would be a great danger of collusion and false claims; and

257. See MODEL PENAL CODE § 2.04(3) (Official Draft, 1962).

258. MODEL PENAL CODE § 2.04, Comment at 138 (Tent. Draft No. 4, 1955).

it would be difficult to ascertain the truth. For example, one member of a conspiracy could take the blame for the offense, testifying that he had entrapped his co-conspirators—thereby presenting the tribunal with uncontradicted testimony of entrapment by all of the parties in a position to have first-hand knowledge of the relevant facts. Alternatively, a defendant could claim entrapment by a person who could not be located by the prosecution, thereby leaving the issue to hinge upon his own uncontradicted testimony. Even if the alleged private entrapper could be located and denied the entrapment, he might turn out to be a witness whose testimony was confused, incredible, or subject to impeachment by past convictions. By contrast, when the alleged entrapper is a government agent, the prosecution has the opportunity to put him on the stand to contradict the defendant's testimony. Moreover, since the government has control over the circumstances of the inducement, it can try to have a credible person present or otherwise develop proof that no undue pressure was applied.²⁵⁹

The private-person exception can also be justified on the ground that, while entrapment doctrine is properly concerned with culpability, it serves other goals as well. There is no reason why there should be only one policy basis for federal entrapment doctrine. There is nothing strange about saying that the presence of multiple factors will tip the scales when the presence of one factor would not be enough. A supporter of the federal approach who is concerned about protecting persons of diminished culpability may also properly be concerned about preserving respect for the courts, controlling police conduct, and excusing victims of discriminatory law enforcement. He may properly limit the defense to circumstances in which these policies would be served simultaneously. Under this theory, the private-person exception to federal entrapment doctrine can be supported on either or both of the following grounds:

(1) The goals of entrapment doctrine include prevention of improper police conduct and preservation of respect for the criminal justice system. These goals may be served by acquitting defendants entrapped by government agents; they cannot be served by acquitting defendants entrapped by private persons. Hence the private-person exception. However, acquittal of dangerous chronic offenders is too high a price to pay for the possibility

259. For example, informers are sometimes equipped with electronic

of achieving these objectives. Hence the distinction between predisposed defendants and nondisposed defendants.

(2) Use by police of overreaching inducements against non-disposed persons is a matter of greater social concern than the use of such inducements against predisposed persons. Zealous pursuit and temptation of predisposed persons may be an effective way of discovering major offenders. However, similar treatment of a nondisposed offender is an inefficient way to uncover crime. An excessive amount of time and money is likely to be spent engineering an offense that yields a "low quality" arrest—e.g., an arrest for sale of a small amount of drugs. Overly zealous pursuit of nondisposed persons therefore raises a suspicion that police agents have motives other than even-handed detection of the crime charged. For example, the defendant may be targeted for arrest because he is known as a political radical. Permitting conviction of nondisposed persons who have been led astray by police may therefore have a chilling effect upon exercise of political freedoms and permit vendettas against unpopular defendants. Permitting conviction of nondisposed persons seduced by private persons does not raise the same danger, since these private temptors want to avoid arrest rather than induce it.

B. OBSCURITY AND CONFUSION

Critics have frequently complained that the federal definition of entrapment is vague, obscure, or mysterious.²⁶⁰ Justice Frankfurter criticized its "unrevealing tests."²⁶¹ Professor Rotenberg has expressed doubt that its concept of an "otherwise innocent" defendant has any meaning at all.²⁶² *State v. Mullen* (one of the three state supreme court cases to reject the federal defense) hypothesized that the jury would be confused by its "welter of catch-phrase concepts."²⁶³

transmitters, thereby permitting conversations with the defendant to be recorded and preserved. See note 337 *infra*.

260. See, e.g., Donnelly, *supra* note 13, at 1107-08; Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 43-44 (federal test is an "elusive doctrine" lacking meaningful distinctions); Rotenberg, *supra* note 256, at 897; *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 247 (1973) (federal approach leads to "bewildering and ambiguous instructions"); Comment, *Entrapment: A Critical Discussion*, 37 MO. L. REV. 633, 648, 659 (1972); authorities cited in notes 261-63 *infra*.

261. *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

262. TIFFANY, *supra* note 13, at 267.

263. *State v. Mullen*, 216 N.W.2d 375, 381 (Iowa 1974).

It is easy to exaggerate the obscurity of the federal test. On the whole, the case law has yielded a coherent and comprehensible body of doctrine. However, confusing language has sometimes crept into the opinions. I will briefly discuss two concepts which have caused difficulty.

Judicial opinions have often said that entrapped persons deserve acquittal because they are "innocent." Some critics have found this term confusing, apparently because it connotes complete lack of culpability.²⁶⁴ Entrapped defendants are not innocent in this sense. In fact, they are guilty of engaging in the exact conduct described in the statutory definition of the crime with which they have been charged. However, they are entitled to acquittal because they might not have committed a crime of the nature charged had they not been tempted by the agent. It is doubtful that calling such defendants innocent persons really engenders much confusion, but in hopes of achieving greater precision I have described them as "nondisposed."

A more serious obstacle to understanding has been created by language in some cases stating that the test of entrapment is whether the "criminal design" or "intent" to commit the crime originated with the police agent or with the defendant.²⁶⁵ This language is confusing because a government agent can be thought to originate the intent to commit a *particular* offense whenever he solicits the commission of that offense, regardless of the amount of pressure applied or the defendant's penchant for crime. Of course, mere solicitation of crime is not prohibited.

264. See, e.g., *United States v. Russell*, 411 U.S. 423, 442 (1973) (Stewart, J., dissenting); *State v. Mullen*, 216 N.W.2d 375, 381 (Iowa 1974); TIFFANY, *supra* note 13, at 267.

265. In *Sorrells v. United States*, 287 U.S. 435, 442 (1932), the Court indicated that an entrapment occurs when "the criminal design originates with the officials of the Government." Other examples of an "origin of intent" formulation are contained in *Ryles v. United States*, 183 F.2d 944, 945 (10th Cir. 1950), which approved an instruction stating that entrapment exists when "government agents induce and originate the criminal intent of the defendant," and *State v. Nelsen*, 228 N.W.2d 143, 147 (S.D. 1975), which says that the issue is "does the evidence show that the criminal intent is traceable to the defendant or to the Government Agent?" See also Note, *The Defense of Entrapment in California*, 19 HASTINGS L.J. 825, 842 (1968) (stating that under California law "the jury must determine whether the intent to commit the crime originated in the mind of the officer or informer, or in the mind of the defendant"); Annot., 22 A.L.R. Fed. 731, 737-38 (1975) (stating that "[w]here the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offense charged in order to prosecute him, no conviction may be had").

The "origin of intent" formula is simply an inartful way of expressing the idea that a defendant should not be excused if he was ready and willing to commit the *type* of offense charged.

The fact that a doctrine has sometimes been explained awkwardly is no reason for discarding it. The federal defense can be formulated in a fashion that makes it as comprehensible to a jury as the hypothetical-person defense. The standard federal jury instructions do so by telling the jury that it should convict the defendant only if it finds beyond a reasonable doubt that he was ready and willing to commit crimes such as those charged whenever a favorable opportunity arose.²⁶⁶

The assertion that it is unduly difficult for juries to conceive a distinction between a predisposed offender and a nondisposed offender is an odd basis for advocating a shift from federal doctrine to the hypothetical-person defense. The latter uses the same concept; the only difference is that the fact-finder is asked to consider the impact of an inducement upon an imaginary nondisposed person instead of a real defendant. For example, the Model Penal Code provides that an entrapment has occurred when the agent uses methods "which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it";²⁶⁷ the Brown Commission proposal defines entrapment as conduct "likely to cause normally law-abiding persons to commit the offense."²⁶⁸ *State v. Mullen*, while asserting that the federal test's "catch-phrase concepts" would cause jury confusion,²⁶⁹ adopted the Brown Commission version of the defense and held that entrapment would remain a jury issue, expressing confidence that "[c]ertainly the jury can weigh conduct which might induce 'a normally law-abiding person' to commit a crime as surely as it can weigh (in a tort case) the required conduct of a 'reasonably prudent person.'"²⁷⁰ The court did not explain why jurors would be able to understand the concept that certain inducements might unreasonably tempt a hypothetical person, and yet be confused when asked whether a real person had been led astray.

266. See 1 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 13.13 (2d ed. 1970) (quoted in note 39 *supra*).

267. MODEL PENAL CODE § 2.13(1)(b) (Official Draft, 1962) (quoted in note 17 *supra*).

268. See BROWN COMMISSION PROPOSAL, *supra* note 17, § 702(2) (quoted in note 17 *supra*).

269. See note 263 *supra* and accompanying text.

270. *State v. Mullen*, 216 N.W.2d 375, 382 (Iowa 1974).

C. "FICTIONAL" LEGISLATIVE INTENT

Critics of federal entrapment doctrine have frequently maintained that it is premised upon a contrived view of legislative intent.²⁷¹

The *Sorrells* majority based its decision upon the theory that Congress could not have intended the National Prohibition Act to apply to persons who had been entrapped into selling liquor.²⁷² As the federal defense developed, it was applied generally to statutes punishing nonviolent crimes, without further discussion of congressional intent. The majority in *Russell*, conceding that the argument against the legislative intent rationale was "not devoid of appeal,"²⁷³ nevertheless reiterated that entrapment doctrine was rooted in "the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense, but was induced to commit them by the Government."²⁷⁴

In *Sherman*, Justice Frankfurter complained that "the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged,"²⁷⁵ and Justice Stewart repeated this criticism in his 1973 dissent in *Russell*.²⁷⁶ The true foundation of entrapment doctrine has been described as "the public policy which protects the purity of government and its processes"²⁷⁷ or the supervisory power of the federal courts to "formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts.'"²⁷⁸ It is said that because the basis of the doctrine is judicial supervisory power instead of congressional intent, the defense must focus solely upon the propriety of the conduct of government

271. See, e.g., *United States v. Russell*, 411 U.S. 423, 441-42 (1973) (Stewart, J., dissenting); *Sherman v. United States*, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring); *Sorrells v. United States*, 287 U.S. 435, 456 (1932) (Roberts, J., concurring); *People v. Turner*, 390 Mich. 7, 19, 210 N.W.2d 336, 341 (1973).

272. *Sorrells v. United States*, 287 U.S. 435, 446-48 (1932).

273. *United States v. Russell*, 411 U.S. 423, 433 (1973).

274. *Id.* at 435.

275. *Sherman v. United States*, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring).

276. *United States v. Russell*, 411 U.S. 423, 442 (1973).

277. *Sorrells v. United States*, 287 U.S. 435, 455 (1932) (minority opinion of Roberts, J.).

278. *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).

agents, rather than on whether the defendant was predisposed.²⁷⁹

Perhaps there was some justification for describing the legislative intent rationale as "fictitious" when entrapment doctrine was still in its formative stages, although the defense had received recognition in federal court prior to the passage of the statute construed in *Sorrells*.²⁸⁰ However, the argument should clearly have no application to modern criminal statutes. The entrapment defense has been recognized by the United States Supreme Court for over 40 years. Surely there is nothing extraordinary in assuming that Congress intends its enactments to be subject to the entrapment defense, just as they are subject to other common-law defenses (such as insanity and duress) that permit acquittal of persons who have performed all of the acts described in a statute as prerequisites of criminal liability.

At any rate, the controversy is a sterile one. If the doctrine is based on a judicial policy concerned with protecting the purity of the courts or deterring police misconduct, one must still face hard questions about the limits of the policy. Is the purity of the courts soiled whenever police agents use an improper inducement, or only when the improper inducement leads to an evil result, such as corruption of the innocent? Is the public policy against improper police conduct compelling enough to justify acquittal of the guilty, or is it sufficiently served by acquittal of nondisposed defendants? These questions cannot be answered simply by saying that the basis for the entrapment doctrine is judicial policy rather than congressional intent.

D. ADMISSION OF HEARSAY

One of the most common criticisms of the subjective defense is based upon the premise that it leads inexorably to the admission of hearsay evidence about predisposition.²⁸¹ Justice Stewart's comment in his *Russell* dissent is typical:

279. *United States v. Russell*, 411 U.S. 423, 440-42 (1973) (Stewart, J., dissenting).

280. *See Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915); cases cited in *Sorrells v. United States*, 287 U.S. 435, 443 & n.4 (1932).

281. *See, e.g., State v. Mullen*, 216 N.W.2d 375, 380, 381 (Iowa 1974) (stating that the subjective test "leads inexorably" to an examination of a defendant's past misdeeds, "rumored and otherwise" and that "the subjective rationale . . . comes with too much dangerous baggage of hearsay, suspicion and rumor evidence"); *United States v. Russell*, 411 U.S. 423, 443 (1973) (Stewart, J., dissenting); *People v. Turner*, 39 Mich.

[A] test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove the defendant's predisposition. It allows the prosecution, in offering such proof, to rely on the defendant's bad reputation or past criminal activities, including even rumored activities of which the prosecution may have insufficient evidence to obtain an indictment, and to present the agent's suspicions as to why they chose to tempt this defendant. This sort of evidence is not only unreliable, as the hearsay rule recognizes; but it is also highly prejudicial. . . .²⁸²

It is hard to understand the basis for this widely prevalent notion that making predisposition a dispositive fact necessarily requires making predisposition provable by reputation and other forms of hearsay evidence. Rules that make other states of mind—malice, knowledge, recklessness, negligence—dispositive facts are not thought to require the admission of hearsay evidence to prove those states of mind. There is nothing special about predisposition that requires the use of otherwise inadmissible hearsay. There are many ways in which predisposition can be proven more reliably. For example, in a drug case, the prosecution could present evidence that the defendant readily complied with the request for drugs; that the defendant obtained a large quantity of drugs on short notice for sale to the agent; that in discussions leading up to the transaction, the defendant disclosed previous drug deals or displayed familiarity with the drug trade; or that drugs or paraphernalia of the drug trade were found in a search of defendant's dwelling.

Despite the lack of any pressing need, a number of federal courts have permitted otherwise inadmissible evidence to be introduced to refute the entrapment defense. Some of it has been shockingly unreliable. It has included "reputation" evidence from witnesses who would be incompetent to testify about reputation in ordinary criminal cases. For example, testimony by a police officer that a single confidential informer told him that the defendant had a reputation for dealing in drugs has been admitted.²⁸³ It has also included hearsay testimony that an un-

7, 20, 210 N.W.2d 336, 342 (1973); Orfield, *supra* note 260. Cf. Donnelly, *supra* note 13, at 1106-07.

282. *United States v. Russell*, 411 U.S. 423, 443 (1973) (Stewart, J., dissenting).

283. See *United States v. Simon*, 488 F.2d 134 (5th Cir. 1973). But see *Whiting v. United States*, 296 F.2d 512, 517-18 (1st Cir. 1961) (reputation witnesses must be personally familiar with defendant's reputation in the community).

In *Sorrells v. United States*, 287 U.S. 435 (1932), the government pro-

named informer reported observing criminal acts by the defendant,²⁸⁴ or that the defendant had previously been arrested (though not convicted) for a crime similar to the one charged.²⁸⁵

Perhaps the willingness of courts to admit testimony about reputation can be explained by the apparent similarity between raising the entrapment defense and "putting character in issue" in a non-entrapment case.²⁸⁶ However, this similarity cannot explain why the prosecution has been allowed to rebut the entrapment defense by introducing hearsay evidence about specific acts, or by using "reputation" witnesses who lack personal knowledge of the defendant's reputation. Such evidence would not be admissible to rebut the testimony of a defendant's character witnesses in a non-entrapment case.²⁸⁷

duced trial testimony that the defendant had "the general reputation of a rum-runner." *Id.* at 441. However, it did so only after the defendant had produced witnesses to testify about his character, *id.* at 440, and the admissibility of this testimony was not in controversy. It appears to have conformed to all the requirements governing prosecution use of reputation testimony in non-entrapment cases. See notes 286-87 *infra*.

284. See *United States v. McKinley*, 493 F.2d 547 (5th Cir. 1974); *United States v. Brooks*, 477 F.2d 453 (5th Cir. 1973); *United States v. Simon*, 488 F.2d 133 (5th Cir. 1973). But see cases cited in notes 294-95 *infra*.

The defendant is in a particularly difficult bind when the hearsay declaration is that of a "confidential informant" whose identity is protected by the informer's privilege, since the defense then has no opportunity to subpoena the hearsay declarant. See *United States v. Brooks*, *supra* (holding that testimony by a government witness that unnamed informers had told him of other narcotics transactions by the defendant was admissible, and that the trial judge properly refused to require that the names of the informers be revealed); *Rocha v. United States*, 401 F.2d 529 (5th Cir. 1968), *cert. denied*, 393 U.S. 1103 (1969).

285. See *Pulido v. United States*, 425 F.2d 1391 (9th Cir. 1970). *Contra*, *United States v. White*, 390 F.2d 405 (6th Cir. 1968).

286. The accused is said to "put his character in issue" when he introduces evidence of good character to prove his innocence. The defendant's character witnesses are permitted to testify only about reputation. C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 191 (2d ed. 1972). But see *FED. R. EV.* 405(a) (permitting witnesses to give personal opinion about character as well as testimony about community reputation). By "putting character in issue," the defendant opens the door to rebuttal reputation testimony by prosecution witnesses. C. McCORMICK, *supra*, § 191; note 287 *infra*.

(The common phrase "putting character in issue" is slightly misleading, since character is not an ultimate issue (dispositive fact) when a defendant produces character witnesses for the purpose of showing that he did not commit the criminal act. See C. McCORMICK, *supra*, § 191; text accompanying note 288 *infra*.)

287. Generally, the prosecutor is permitted to rebut the defendant's evidence of good reputation in three ways: (1) The prosecutor may cross-examine the defendant's character witnesses in an attempt to show

Moreover, the analogy between "putting character in issue" and raising the entrapment defense is a false one. In a non-entrapment case in which the defendant has chosen to offer testimony about his reputation, his character is not a dispositive fact. Character evidence is offered merely to support the inference that because the defendant was a good man he would not have committed the offense charged. There are many other ways to defend against the charge, and more convincing evidence can be offered by both sides. Therefore, the courts have limited such character evidence to reputation testimony, on the theory that proof of specific past conduct of the defendant, while it may be more probative than reputation evidence, would confuse juries, unduly prolong trials, and create a danger of unfair surprise.²⁸⁸ Conversely, the relative unreliability of reputation evidence can be tolerated because it is not crucial, and the defendant can always avoid its admission by not calling character witnesses.

By contrast, in an entrapment case in a jurisdiction applying the federal test, a trait of the defendant's character (his propen-

that they are not really acquainted with community opinion. In doing so, he is normally permitted to ask whether the witness has heard that the defendant committed specific crimes or acts inconsistent with the reputation vouched for. However, most jurisdictions do not allow the prosecutor to refute the witness's answer with extrinsic evidence. (2) The prosecutor may call to the stand witnesses who will testify that the defendant has a bad reputation for the trait in question. However, these witnesses are not permitted to testify about specific criminal acts. Moreover, they must themselves be persons who have knowledge of the defendant's reputation in the community. (3) A minority of jurisdictions permit the prosecutor to introduce evidence of convictions of the defendant for recent crimes which are inconsistent with the trait of character vouched for by the defense witnesses. However, prosecution witnesses are not permitted to testify about arrests that have not resulted in conviction or about statements by out-of-court declarants concerning undicted crimes committed by the defendant. See generally C. McCORMICK, *supra* note 286, § 191. On the requirement that reputation witnesses be shown to be personally familiar with the defendant's reputation in the community, see *Whiting v. United States*, 296 F.2d 512, 517 (1st Cir. 1961), and cases cited therein; 3 J. WIGMORE, EVIDENCE §§ 691-92 (Chadbourn rev. 1970); cases cited in 5 *id.* § 1612 n.1 (1974).

The new Federal Rules of Evidence are in conformity with the common-law rules described above, except that they permit opinion as well as reputation testimony. See note 286 *supra*. They adopt the majority rule prohibiting the introduction of other convictions. See FED. R. EV. 404 (b).

288. See C. McCORMICK, *supra* note 286, § 191 at 456 & n.69. The new Federal Rules of Evidence permit opinion as well as reputation testimony, see note 286 *supra*, on the theory that it does not involve these dangers of prolongation, confusion, and surprise. See FED. R. EV. 405, Advisory Committee Note.

sity to commit the type of crime charged) is a dispositive fact. If the jury finds that he was not predisposed he will be entitled to acquittal; a contrary finding will ordinarily result in conviction.²⁸⁹ Predisposition is in no sense a collateral issue. There is every reason to require the most reliable evidence available, and not to tolerate the use of reputation or other hearsay evidence.

Character is also a dispositive fact in certain types of non-entrapment cases. For example, in a slander case in which the defamatory words disparage a trait of the plaintiff's character, character is a dispositive fact if the defendant raises the defense of truth. Similarly, in an action for negligently entrusting a motor vehicle to an incompetent driver, a trait of the driver's character (his competency) is a dispositive fact. In such cases, evidence of a trait of character is not being offered merely as a basis for inferring some other fact, as it is in a non-entrapment case in which a criminal defendant introduces character evidence. Character is one of the ultimate issues upon which liability turns. Therefore, common-law doctrine provides that character may be proven by evidence of specific prior acts indicative of the trait of character in issue.²⁹⁰ In other words, when character is a central issue, the more reliable form of evidence has been admitted, even at the cost of time and convenience. Once this more reliable evidence becomes admissible, the reasons for relying upon reputation evidence no longer apply. Accordingly, some courts have held that reputation evidence is inadmissible when character is a dispositive fact.²⁹¹ This approach should be followed in entrapment cases. If the defendant was actually ready and willing to commit the offense, the prosecution should be able to prove predisposition by evidence of a more reliable nature.²⁹²

The theory that accepting the subjective approach necessarily requires admission of reputation and other hearsay evi-

289. Predisposition is normally the only dispositive fact in issue in entrapment cases. Defendants rarely raise the entrapment defense in cases in which they deny committing the criminal act. See note 308 *infra*.

290. See C. McCORMICK, *supra* note 286, § 187; 1 J. WIGMORE, EVIDENCE § 202 (3d ed. 1940).

291. See C. McCORMICK, *supra* note 286, § 187 at 444 & n.9; Hunt v. McNamee, 141 F. 293, 299 (4th Cir. 1905) (incompetency of independent contractor hired by defendant could not be proven by reputation but only by specific acts of conduct); Guedon v. Rooney, 160 Ore. 621, 87 P.2d 209 (1939).

292. For a description of types of evidence which may be used to prove predisposition, see text accompanying notes 119-27 *supra*.

dence has not been universally accepted. The Supreme Court of California has accepted the subjective approach while at the same time refusing to permit proof of predisposition by reputation or other hearsay evidence.²⁹³ Some federal courts have gone part way, excluding hearsay evidence that is particularly unreliable.²⁹⁴ Moreover, a 1969 opinion from the Third Circuit expressed unqualified disapproval of the entrapment exception to the hearsay rule.²⁹⁵

The Federal Rules of Evidence, which became effective in 1975, may preclude federal courts from excluding reputation testimony. These rules provide that when a trait of character is an essential element of a charge or defense, reputation and opinion testimony about character may be admitted²⁹⁶ as well as testimony about specific instances of conduct.²⁹⁷ However, the rules give no warrant for admitting second-hand reputation evidence (testimony by a person who does not have personal knowledge of community sentiment) or hearsay evidence of specific instances of criminal conduct.²⁹⁸ Perhaps these anomalous features of the federal entrapment defense will die out.

In states that have not codified their rules of evidence, there is no such obstacle to ending the use of reputation evidence to rebut the entrapment defense. The admission of reputation evidence cannot be justified when the prosecution is allowed to introduce evidence of specific acts. Such evidence ought to be ex-

293. *People v. Benford*, 53 Cal. 2d 1, 345 P.2d 928 (1959).

294. See, e.g., *United States v. Ambrose*, 483 F.2d 742, 749-50 (6th Cir. 1973) (trial judge committed reversible error by admitting testimony that defendant was on police list of suspected violators compiled from information received from persons of unknown reliability); *United States v. Johnston*, 426 F.2d 112, 113-14 (7th Cir. 1970) (trial judge committed reversible error by allowing jury to hear officer's testimony that two years earlier informer, now dead, had told officer of obtaining drugs from defendant); *Whiting v. United States*, 296 F.2d 512, 516-17 (1st Cir. 1961) (testimony about anonymous telephone calls and hearsay testimony about statements from named informers who were not shown to have personal knowledge of criminal activity held inadmissible). But see cases cited in notes 283-85 *supra*.

295. *United States v. Catanzaro*, 407 F.2d 998, 1000-01 (3d Cir. 1969) (admission of testimony that out-of-court declarant had told officer that defendant was "under the influence of bennies" and "would sell [drugs] to anyone approaching him" was reversible error). The position of the Ninth Circuit is unclear. Compare *United States v. Walton*, 411 F.2d 283, 291 & n.12 (9th Cir. 1969) (dictum) (disapproving hearsay), with *Pulido v. United States*, 425 F.2d 1391 (9th Cir. 1970) (admitting arrest record).

296. FED. R. EV. 405(a).

297. *Id.* 405(b).

298. See note 172 *supra* and accompanying text.

cluded unless the defendant opens the door by calling character witnesses to testify about his reputation.

The use of reputation and other hearsay evidence is certainly not an inevitable consequence of differences between the subjective and hypothetical-person approaches to the substantive law of entrapment. One of the strange quirks of the entrapment controversy is that it is commonly assumed that the hypothetical-person approach will lead to exclusion of testimony about out-of-court statements, when in fact there may be a greater need for use of such statements under this approach than under one that focuses directly on the defendant's predisposition. The need for such statements arises from the fact that it may be necessary to consider what the police agent knew about the defendant in order to determine whether the agent's conduct was proper.²⁹⁹

For example, repeated requests by the agent that the target commit a crime may constitute entrapment. However, a target's refusal on first request is often an ambiguous act. It may indicate that the target is a reluctant innocent, or it may strengthen suspicion that he is a wary criminal. The more successful the target has been in his criminal enterprise, the less likely he is to be eager to deal with strangers; for while ready compliance is a sign of willingness, it is also the sign of a novice. Sometimes the agent would be justified in persisting after the refusal. In determining whether persistence was justified, it would be helpful to scrutinize the target's reasons for refusal in light of what the agent knew about the target's proclivities.³⁰⁰

If the agent's knowledge of the target is to be taken into account, it may be necessary to admit out-of-court statements about the target's activities, for the agent's knowledge will frequently come second- or third-hand from police sources. When such state-

299. See text accompanying notes 128-42 *supra*. The current authoritative formulations of the hypothetical-person approach seem to permit at least some evidence of what the agent knew about the target's activities to be admitted for the purpose of evaluating the agent's conduct. See text accompanying notes 143-53 *supra*.

300. The grounds given by the target for refusal need to be construed in light of what is known about him. Suppose, for example, that the agent asked a target for cocaine, and the target refused, saying that cocaine was dangerous. If the agent had information that the target was a dealer in cocaine (or even a user), the grounds given for refusal would suggest that the target was lying because he thought that the agent was a police spy. The agent might be justified in persisting, and even in trying to build up the target's confidence in him by developing a personal relationship—in other words, by making an "appeal to friendship." See *generally* text accompanying notes 128-53 *supra*.

ments are offered only to show that the agent acted properly, they do not fall under the traditional definition of hearsay at all. The evidence would not be offered to show the truth of the matter asserted (that defendant was already engaged in crime) but to show its effect on the hearer (that the agent reasonably believed that the defendant was engaged in crime).³⁰¹

The history of the entrapment exception to the hearsay rule supports the idea that there is a stronger case for admission of out-of-court statements under a test that focuses upon the propriety of police conduct than there is under the subjective test. During the formative years of federal entrapment doctrine, some courts supposed that entrapment could be established by showing that the inducing agent lacked reasonable cause to suspect crime,³⁰² or that the presence of reasonable suspicion was an alternative basis for defeating an entrapment defense.³⁰³ Under these theories statements by out-of-court declarants to agents were admissible to show reasonable suspicion.³⁰⁴ Federal opinions which have questioned the entrapment exception to the hearsay rule have pointed out that under the modern doctrine the issue is predisposition, not reasonable cause, so out-of-court statements to the agent need not be admitted.³⁰⁵

301. See note 174 *supra*.

302. See text accompanying notes 112-14 *supra*.

303. See text accompanying notes 115-17 *supra*.

304. See *Heath v. United States*, 169 F.2d 1007 (10th Cir. 1948). The court held that testimony that an officer had selected defendants for investigation "[b]ecause of [his] previous knowledge of their liquor activity" and because he had received "numerous reports—one source was a sheriff" was admissible. It reasoned that the evidence was not offered to show guilt but to show that the officer had "reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused." *Id.* at 1010. Cf. *Whiting v. United States*, 296 F.2d 512, 516-18 (1st Cir. 1961). See also *United States v. Perry*, 478 F.2d 1276, 1280 (7th Cir. 1973). In *Perry* the court noted that the defendant complained that some of the evidence introduced against him had been hearsay. It justified admission on grounds that

to negative a claim of entrapment, it is permissible to entertain evidence of the defendant's reputation and of the officers' basis for their actions. . . . The better practice might be to separate, where possible, the evidence adduced to show predisposition and the evidence offered to show reasonable grounds [but the failure to do so was not prejudicial error in this case].

Id. at 1280 (emphasis added).

305. This brings us to the legal question whether, when entrapment is in issue, testimony reciting a statement of an absent person which in fact indicates that the accused was predisposed to criminal behavior should be admitted even for the stated limited purpose of showing that the officers were justified in or had probable cause for providing the accused with an opportunity to commit the crime in question.

In short, if the issue is whether an agent's methods of inducement were reasonable, second- and third-hand statements to the agent about the target's prior conduct may need to be considered in evaluating the agent's conduct. On the other hand, if the question is whether the defendant was ready and willing to commit the offense, the court may properly require that more reliable evidence be offered. Since the prosecution can prove predisposition by subsequent conduct and by prior conduct not known to the agent, it is not burdensome to require that it do so without the use of reputation and other hearsay evidence.

E. ADMISSIBILITY OF EVIDENCE OF OTHER CRIMES

Proponents of the hypothetical-person approach have frequently criticized the federal defense on grounds that it permits the admission of "prejudicial" evidence about other crimes committed by the defendant.³⁰⁶ This evidence may take the form of testimony about convictions, about arrests which did not result in convictions, or about criminal activity that led neither to arrest nor conviction. Because these three types of testimony raise distinct issues, I will discuss them separately.

1. *Evidence of Unpublished Crimes*

Trial testimony in entrapment cases frequently includes ac-

We hold that such evidence is inadmissible. The basic question in an alleged entrapment case is whether the accused was ready and willing to commit the crime if an opportunity should be presented. . . . Proof that the agents of government did no more than provide the wrongdoer with an opportunity for criminal conduct would suffice to negative entrapment. No significant purpose would be served by a further showing of their reason for approaching him.

United States v. Catanzaro, 407 F.2d 998, 1001 (3d Cir. 1969). Similar language appears in United States v. Walton, 411 F.2d 283, 291 n.12 (9th Cir. 1969).

306. It is a strange doctrine that makes guilt or innocence depend upon whether a defendant has committed other similar offenses. However bad a person may be, however guilty of crime, it is nevertheless a principle of our system of criminal law administration that conviction and punishment must be for some specific act or crime proved against an accused by competent evidence compelling an inference of guilt as to the specific act, and not for a general criminal depravity or wickedness. The admission of this kind of evidence invariably prejudices the jury against the accused and diverts their attention from an impartial consideration of the evidence of the particular crime charged.

Donnelly, *supra* note 13, at 1108. See also *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring); BROWN COMMISSION COMMENTARY, *supra* note 13, at 325.

counts of crimes for which the defendant was not arrested, charged, or convicted.

There are legitimate reasons why the prosecution may choose to use evidence of other crimes as predisposition evidence rather than charging those crimes separately. Although the prosecution might be unable to prove beyond a reasonable doubt that a particular crime was committed, the probability that it was committed may be valuable evidence of predisposition to commit a subsequent crime.

For example:

(1) An undercover officer is present when a defendant willingly sells cocaine to a third party. The officer decides that it would be unwise to attempt to make a purchase himself at that time. At this point it would be difficult to prove that defendant had illegally sold cocaine. He may have been defrauding his customer; he may have been mistaken himself about the nature of the substance; the whole affair may have been a practical joke. Soon afterwards, however, the officer succeeds in purchasing a drug from the defendant which is analyzed as cocaine. The evidence of the apparent prior sale indicates that the defendant was ready and willing to make the subsequent sale.

(2) An addict is apprehended in possession of heroin. He offers to cooperate in return for leniency, and claims that he bought the heroin from *D*. At this point, the prosecutor has little chance of convicting *D* on the basis of the informer-addict's uncorroborated testimony. Therefore, an undercover officer arranges to have the informer-addict introduce him to *D*. The officer succeeds in making a purchase from *D* of heroin identical to that taken from the informer-addict. The addict's testimony of prior purchases from *D* is probative evidence of predisposition in a case in which *D* is charged with a sale to the officer.

The usual objections to using testimony about uncharged crimes as evidence of character are that such evidence confuses the issues, prolongs trials, causes unfair surprise, and prejudices the jury.³⁰⁷ These objections do not apply to entrapment cases. In the usual criminal case, character is an evidentiary fact of relatively minor importance; in entrapment cases, character is a

307. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (disallowance of evidence of prior crimes "tends to prevent confusion of issues, unfair surprise and undue prejudice"); 1 J. WIGMORE, EVIDENCE §§ 57, 194 (3d ed. 1940).

dispositive fact—normally the only dispositive fact in dispute.³⁰⁸ Obviously, the dangers of confusion of issues and prolongation of the trial cannot justify exclusion of valuable testimony bearing on this central issue. The danger of unfair surprise can be handled by requiring notice of intent to introduce the evidence.³⁰⁹

The argument that testimony about prior criminal conduct is “prejudicial” because the jury may punish the defendant for being a bad man instead of for committing the specific act charged³¹⁰ is based upon a misleading analogy of entrapment cases to cases in which the defendant has denied committing the criminal act. In the latter type of case, there is a risk that the jury will decide that the defendant must have committed the act charged because he previously committed similar crimes. This danger of prejudice is sufficient to justify exclusion of evidence of other crimes. In entrapment cases, there is rarely a genuine dispute about whether the defendant committed the criminal act; indeed, many jurisdictions do not even permit a defendant to maintain a defense of entrapment and a defense of complete innocence simultaneously.³¹¹ The fact-finder knows that the defendant committed the act charged. The issue is precisely whether he was a “bad man” who was predisposed to commit the type of crime charged. On this issue, evidence of recent criminal activity of a similar nature is as reliable as any other. Nothing

308. Normally a defendant who raises the entrapment defense will not contest testimony that he committed the criminal act. In fact, many jurisdictions do not permit a defendant to raise the entrapment defense while denying the commission of the crime. See Groot, *The Serpent Beguiled Me and I (Without Scierter) Did Eat—Denial of Crime and the Entrapment Defense*, 1973 U. ILL. L.F. 254, 256. The paucity of cases on the issue of whether the entrapment defense is barred to a defendant who denies commission of the crime, see *id.* at 264 n.44, suggests that defendants rarely try to maintain both defenses simultaneously. Such a posture would normally be unwise in a drug case, where defendant's denial of participation would likely destroy whatever credibility his claim of entrapment might have. See *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975) (noting that “[w]hile we hold that a defendant may both deny the acts and other elements necessary to constitute the crime charged and at the same time claim entrapment the high risks to him make it unlikely as a strategic matter that he will choose to do so”).

309. See *State v. Grilli*, 230 N.W.2d 445 (Minn. 1975) (requiring notice by the defendant of intent to raise the entrapment defense, and a reciprocal written statement by the prosecution specifying the other offenses it intends to show that defendant committed).

310. See note 306 *supra*.

311. See note 308 *supra*.

is added to the controversy over whether predisposition should be a dispositive fact by labeling such evidence "prejudicial."

A rule excluding evidence of prior unpunished crimes would have a harsh effect upon defendants who never previously committed crimes of the nature charged. If such evidence is admissible, these defendants will benefit from the government's failure to produce it.³¹² Excluding the evidence benefits chronic offenders to the detriment of others.

2. Arrests or Charges Which Did Not Result in Conviction

In jurisdictions following the subjective approach, the prosecution has occasionally sought to prove predisposition by introducing records of prior arrests that did not result in convictions. Sometimes this evidence has been admitted under the anything-goes theory of predisposition evidence—that since the defendant has opened the issue of entrapment, any evidence having the remotest bearing on his propensity is admissible.³¹³

This attitude is insupportable. Evidence of an arrest record shows nothing more than that one officer once believed (or purported to believe) that the defendant had committed a crime. It has all of the vices of opinion and hearsay testimony.

The inadmissibility of evidence about an arrest itself does not, of course, require exclusion of direct testimony about the

312. See, e.g., *United States v. West*, 511 F.2d 1083 (3d Cir. 1975). The court held entrapment had been established as a matter of law. In explaining why the government's evidence of predisposition had been insufficient to support a jury verdict, the court noted, *inter alia*, that the prosecution "conceded that West had no history of past participation in the narcotics traffic." *Id.* at 1085. See also cases discussed in note 184 *supra*.

313. See *Pulido v. United States*, 425 F.2d 1391, 1393-94 (9th Cir. 1970) (*held*, a 12-year-old record of an arrest that did not lead to conviction was admissible; "[a]rrest records for related offenses should be treated as one species of [admissible] hearsay evidence of predisposition"). *Contra*, *United States v. White*, 390 F.2d 405 (6th Cir. 1968) (alternative holding).

Pulido is among the cases which have used the statement in *Sorrells v. United States*, 287 U.S. 435, 451 (1932), that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition," as a basis for an argument that evidence having even the remotest bearing on predisposition ought to be admitted. This language actually provides little guidance, since the Court's statement that a "searching inquiry" should be made is qualified by the word "appropriate." See *Whiting v. United States*, 296 F.2d 512, 515-16 (1st Cir. 1961) (noting use of qualifying word "appropriate" and excluding certain hearsay evidence).

events that caused the arrest. If the prosecution has first-hand testimony of a criminal act which formed the basis for an arrest, then that testimony should be admitted on the same basis as testimony of prior acts which did not result in arrests.³¹⁴

3. *Records of Prior Convictions*

The admission of evidence of prior convictions raises problems different from those presented by evidence of crimes not charged. The evidence that the crime occurred is reliable enough; a competent tribunal has determined beyond a reasonable doubt that the defendant was guilty. However, it is possible that defendant's conviction and subsequent punishment caused him to change his ways. Moreover, there is a danger that police might feel free to offer ex-convicts very attractive inducements, planning to rely upon prior convictions to establish predisposition at trial. Justice Frankfurter expressed these concerns in his opinion in *Sherman*, saying that the majority view violated "fundamental principles of equality under law" by encouraging police agents to tempt past offenders with stronger inducements than could be used against other citizens, and that "the whole ameliorative hopes of modern penology" counseled against this practice.³¹⁵

Although these arguments are troubling, it is not clear that their assumptions about police practices are accurate. The overzealous pursuit of past offenders may be less common than critics of the federal test have suggested. In drug cases (the offense category in which entrapment claims most frequently arise)³¹⁶ officers commonly ask informers to set up drug sales. The informer, not the police officer, usually determines who the seller will be.³¹⁷ The theory that informers will single out ex-convicts depends upon the unproven assumption that they will concentrate

314. An exception should be made, however, when the arrest led to an acquittal on a plea of not guilty. Principles of judicial economy should preclude relitigation of the issue of guilt. However, when a prosecution was not prossed or dismissed, or when an arrest never led to complaint or indictment, direct evidence about criminal conduct which caused the arrest should be admissible, though the fact of arrest itself should be inadmissible.

315. *Sherman v. United States*, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring.) See also *United States v. Russell*, 411 U.S. 423, 443-44 (Stewart, J., dissenting); MODEL PENAL CODE § 2.10, Comment at 14-15 (Tent. Draft No. 9, 1959); BROWN COMMISSION COMMENTARY, *supra* note 13, at 306-07.

316. See note 223 *supra*.

317. See notes 225-26 *supra* and accompanying text.

on targets who have criminal records rather than on other potentially vulnerable persons, because they know (or are told) that certain potential targets have criminal records and that stronger inducements can be used against these targets.

Even if agents do pursue persons with past records because of those records, then there is still a question whether the practice is detrimental. Arguably, past offenders are exactly the persons against whom agents should be allowed to use persuasive inducements, so long as the inducements fall short of duress or the sort of outrageous conduct which violates due process. There is no "fundamental principle of equality under law" which requires that past offenders be treated exactly the same as persons with clean records. Past offenders are subjected to parole supervision and other legal disabilities. Moreover, the "ameliorative hopes of modern penology" have not lived up to expectations. Prison rehabilitation efforts have rarely succeeded.³¹⁸ If agents do pursue past offenders with special zeal, this practice may actually deter crime by increasing the risk of detection. The litigated entrapment cases present us with instances in which past offenders yielded to solicitations by government agents; no one knows whether there are other past offenders who resisted crime they could successfully have committed for fear that they were dealing with a government agent.

At any rate, acceptance of the argument that prior convictions should be excluded from evidence need not lead to rejection of the subjective approach. There is nothing illogical about accepting an entrapment defense based upon predisposition while at the same time excluding evidence of prior convictions for rea-

318. Empirical studies of rehabilitation programs suggest that they have almost always been failures. One recent project examined all studies of rehabilitative programs which were published in English from 1945 through 1967. Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22. After discarding studies whose design and execution did not meet "the conventional standards of social science research," *id.* at 24, the project team scrutinized 231 studies dealing with such disparate methods of treatment as education, vocational training, psychotherapy, probation/parole, and halfway houses. The project leader, sociologist Robert Martinson, concluded that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism," *id.* at 25, and that, but for the retributive and deterrent functions of punishment, it might be wisest simply to release low-risk offenders and to provide mere custodial incarceration for dangerous offenders. *Id.* at 49-50.

sons of extrinsic policy. Evidence of prior convictions can be helpful in determining predisposition, but it is not indispensable. Other probative evidence will normally be available to the prosecution.³¹⁹

State courts and legislatures may properly embrace the subjective approach while at the same time excluding evidence of past convictions. At least two have done so.³²⁰ However, the lower federal courts are not equally free. Precedent in the courts of appeals strongly supports admissibility.³²¹ Moreover, although the Supreme Court has not expressly ruled on the admissibility of prior convictions, its opinion in *Sherman* seems to condone admission. In *Sherman*, the trial court had admitted evidence of prior convictions over the defendant's objections.³²² The Court did not express disapproval of the admission of this evidence, but merely noted that

a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time [the agent] approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time.³²³

This passage implies that evidence of prior convictions may properly be considered, even though in the *Sherman* case the evidence was not, in itself, sufficient to justify a finding of predisposition.

The discussion thus far has concerned the use of evidence of prior convictions by the prosecution. A different issue is presented when the defendant seeks to place before the jury the fact

319. For a description of evidence which may be offered to prove predisposition, see text accompanying notes 119-25 *supra*.

320. *State v. Nelson*, 228 N.W.2d 143 (S.D. 1975), and *People v. Benford*, 53 Cal. 2d 1, 345 P.2d 928 (1959), follow the subjective approach but exclude evidence of prior convictions. *But see People v. Foster*, 36 Cal. App. 3d 594, 111 Cal. Rptr. 666 (Ct. App. 1974). The *Foster* case questioned the continuing validity of this aspect of *Benford*. The principal basis for doing so was *People v. Schader*, 71 Cal. 2d 761, 457 P.2d 841, 80 Cal. Rptr. 1 (1969). Although *Schader* was not an entrapment case, it stated broadly that trial judges have discretion to admit prior convictions when probative value outweighs prejudicial effect. *Id.* at 772-73, 457 P.2d at 848, 80 Cal. Rptr. at 8. Cf. *People v. Mora*, 42 Cal. App. 3d 824, 117 Cal. Rptr. 262 (Ct. App. 1974).

321. See, e.g., *Nutter v. United States*, 412 F.2d 178 (9th Cir. 1969), *cert. denied*, 397 U.S. 927 (1970) (prior conviction for narcotics violation held admissible in trial for similar offense); *Whiting v. United States*, 296 F.2d 512 (1st Cir. 1961) (dictum) (prior convictions admissible, so long as crime is similar). See generally Annot., 61 A.L.R.3d 293, 309-13 (1975).

322. See *United States v. Sherman*, 240 F.2d 949, 952 (2d Cir. 1957), *rev'd on other grounds*, *Sherman v. United States*, 356 U.S. 369 (1958).

323. 356 U.S. at 375-76.

that he has no criminal record. This evidence should be admissible regardless of how the issue of prosecutorial use of prior convictions is resolved. The policies that have been advanced to prohibit use of prior convictions by the prosecution do not apply to use of a clean record by the defense. The jury would not be prejudiced; rehabilitation would not be thwarted. A rule prohibiting use of evidence about prior convictions except at the defendant's initiative would be precisely analogous to the rule excluding evidence of the character of the accused unless he has introduced evidence of good character.³²⁴ Of course, once the defendant chooses to claim a clean record, the prosecution should be allowed to rebut his claim by proving prior convictions.

V. PROCEDURAL ISSUES

A. ALLOCATION OF BURDEN OF PROOF

The classic description of the allocation of burden of proof in federal entrapment cases is contained in Judge Hand's opinion in the first *Sherman* appeal:

[In entrapment cases] two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it.³²⁵

Judge Hand's description is still frequently cited,³²⁶ but two qualifications must be added to it in order accurately to describe the current federal case law. First, modern case law indicates that while the defendant has the burden of production on the issue of inducement, he does not have the burden of persuasion. To raise an issue for the jury, he need only produce, through government witnesses or otherwise, some evidence that government agents induced the offense. He need not persuade the trial judge that the evidence is credible.³²⁷ Nor is he required to persuade the jury. Almost every federal court of appeals that has con-

324. For a description of this rule, see C. McCORMICK, *supra* note 286, § 191.

325. *United States v. Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952).

326. *United States v. Pugliese*, 346 F.2d 861, 862 (2d Cir. 1965) (quoting from "the often-cited discussion by Judge Learned Hand"). Other cases quoting Judge Hand's formulation include *United States v. Braver*, 450 F.2d 799, 801 n.5, 802 (2d Cir. 1971); *United States v. Prieto-Olivas*, 419 F.2d 149, 151 (5th Cir. 1969); *United States v. Johnson*, 371 F.2d 800, 803 (3d Cir. 1967); *Notaro v. United States*, 363 F.2d 169, 174 (9th Cir. 1966); *Gorin v. United States*, 313 F.2d 641, 652 n.6 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).

327. See cases cited in notes 50, 53 *supra*.

sidered the issue has disapproved jury instructions placing the burden of persuasion upon the defendant on the issue of inducement.³²⁸

This view has not received unanimous approval. The Second Circuit Court of Appeals has stated that the defendant has the burden of persuasion as well as the burden of production on the issue of inducement, and has affirmed a conviction in a case in which the trial judge told the jury that the defendant had the burden of proving inducement by a preponderance of the evidence.³²⁹ However, because the Second Circuit has defined "inducement" to include a mere request that a crime be committed (unaccompanied by any pressure),³³⁰ there will ordinarily be no dispute over whether the government induced the crime and hence no occasion for instructing the jury about the burden of persuasion on the issue.

328. This result has been accomplished by disapproving the so-called "bifurcated" instructions, which tell the jury that the defendant has the burden of persuasion on the issue of inducement while the government has the burden on predisposition. See *United States v. Watson*, 489 F.2d 504, 509-10 (3d Cir. 1973); *United States v. Groessel*, 440 F.2d 602, 606 (5th Cir. 1971); *Notaro v. United States*, 363 F.2d 169, 175 (9th Cir. 1966); *Sagansky v. United States*, 358 F.2d 195, 202-03 (1st Cir.), *cert. denied*, 385 U.S. 816 (1966); *Johnson v. United States*, 317 F.2d 127, 129 n.2 (D.C. Cir. 1963). (The holdings of *Sagansky* and *Notaro* were modified in later opinions, but the modifications do not affect the aspect of those cases which deals with bifurcated jury instructions. See *United States v. Christopher*, 488 F.2d 849, 851 n.1 (9th Cir. 1973); *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967).)

The standard federal instruction makes no reference to any requirement that the defendant prove inducement. See note 39 *supra*.

329. *United States v. Braver*, 450 F.2d 799, 801-03 (2d Cir. 1971). The portion of the trial judge's instruction dealing with the defendant's burden of proof read as follows:

The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government. That is, did the government initiate the criminal transaction? On this issue the defendant has the burden of proof. He does not have to prove it beyond a reasonable doubt but he must prove it by a fair preponderance of the evidence. That is, he must satisfy you that it is more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no entrapment, but if you do find such inducement then you must consider the second issue.

Id. at 801 n.4. Cf. *United States v. Pugliese*, 346 F.2d 861, 863 (2d Cir. 1965) (conviction reversed because, under language of trial judge's bifurcated instruction, jury might have believed that defendant had burden of proving inducement beyond a reasonable doubt).

330. *E.g.*, *United States v. Riley*, 363 F.2d 955, 958 (2d Cir. 1966). Note that in the instruction quoted in the foregoing footnote the trial judge defined inducement merely as initiation of the criminal transaction.

Judge Hand's statement must be further qualified by noting that several recent cases have supplemented the requirement that a defendant produce evidence of inducement by requiring him also to produce some evidence tending to negate his propensity to commit the crime.³³¹ These cases thus seem to impose upon the defendant a burden of production on the issue of predisposition.

The federal courts have uniformly held that once the entrapment defense has been properly raised, the government has the burden of persuasion on the issue of predisposition, and that predisposition must be proven beyond a reasonable doubt.³³² Most of the states that have endorsed the subjective version of the entrapment defense have followed suit.³³³

The Model Penal Code and the Brown Commission proposal place the burdens of production and persuasion on the defendant,³³⁴ as do most of the other formulations of the hypothetical-

331. See text accompanying note 51 *supra*.

332. See *United States v. Mosely*, 496 F.2d 1012, 1014-15 (5th Cir. 1974); *United States v. Rosner*, 485 F.2d 1213, 1221-23 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States v. Ambrose*, 483 F.2d 742, 752-53 (6th Cir. 1973); *Martinez v. United States*, 373 F.2d 810, 812 (10th Cir. 1967); *Notaro v. United States*, 363 F.2d 169, 175-76 (9th Cir. 1966); cases cited in note 39 *supra*.

333. See *State v. McKinney*, 108 Ariz. 436, 501 P.2d 378 (1972); *State v. Whitney*, 157 Conn. 133, 249 A.2d 238 (1968); *Reed v. State*, 130 Ga. App. 659, 204 S.E.2d 335 (1974); *Commonwealth v. Miller*, 361 Mass. 644, 282 N.E.2d 394 (1972); *State v. Dolce*, 41 N.J. 422, 197 A.2d 185 (1964); *State v. Carrillo*, 80 N.M. 697, 460 P.2d 62 (Ct. App. 1969); *Striplin v. State*, 499 P.2d 446 (Okla. Ct. Crim. App. 1972). Illinois provides by statute that once the issue of entrapment has been properly raised by the defendant the burden of persuasion rests on the state. ILL. ANN. STAT. ch. 38, §§ 3-2, 7-12, 7-14 (Smith-Hurd 1972).

A few subjective-test states have placed the burden on the defendant. See *People v. Moran*, 1 Cal. 3d 755, 463 P.2d 763, 83 Cal. Rptr. 411 (1970); *State v. Gilman*, 110 R.I. 207, 291 A.2d 425 (1972); *Hawthorne v. State*, 43 Wis. 2d 85, 168 N.W.2d 82 (1969). In some states, statutes copied almost verbatim from the Model Penal Code have, despite their source, been construed by state courts to establish a subjective test. Compare N.Y. PENAL LAW § 40.05 (McKinney 1972), with *People v. Calvano*, 30 N.Y.2d 199, 282 N.E.2d 322, 331 N.Y.S.2d 430 (1972). These statutes, like the Model Penal Code, place the burden of persuasion on the defendant. See *People v. Laietta*, 30 N.Y.2d 68, 281 N.E.2d 157, 330 N.Y.S.2d 351 (1972); statutes cited in note 16 *supra*.

334. Section 2.13(2) of the Model Penal Code places the burden upon the defendant to "[prove] by a preponderance of evidence that his conduct occurred in response to an entrapment."

Section 702(1) of the Brown Commission proposal states that entrapment is an affirmative defense. Section 103 of the proposal states that affirmative defenses are defenses as to which the defendant has the burden of persuasion by a preponderance of the evidence.

person defense.³³⁵ The draftsmen of the Model Penal Code justified this allocation of the burden of proof on grounds that:

The defense does not assert that the defendant has not engaged in criminal activity nor does it truly seek to excuse or justify a criminal act. The defense is, in fact, a complaint by the accused against the state for employing a certain kind of unsavory enforcement. The accused is asking to be relieved of the consequences of his guilt by objecting to police tactics. He is a plaintiff and should be required to come forward with the evidence and to establish the main elements of his claim by a preponderance of proof.³³⁶

This argument obviously does not apply to the subjective approach under the rationale that I have ascribed to it, for that rationale does "truly seek to excuse" a criminal act. Furthermore, the argument is unconvincing even if its premise about the basis for the entrapment defense is accepted. The allocation of the burden of proof should not depend upon whether the defense "truly seeks to excuse or justify" or whether it "places the defendant in the position of a plaintiff." There are better bases for allocating the burden of proof—as by determining which party has easier access to evidence; by deciding whether the issue is such that proof of an affirmative proposition is more feasible than proof of a negative proposition; by deciding whether the policies underlying the defense are so important that factual doubts should be resolved in its favor. If all of these criteria were fulfilled—if the prosecution had better access to evidence, if it were more feasible to prove that agents had acted properly than that they had acted improperly, if entrapment were a favored defense because of the importance of controlling police

335. See 5 N.H. REV. STAT. ANN. § 625.5 (Supp. 1973) (entrapment an affirmative defense); *id.* at § 626.7 (defendant has burden of persuasion by preponderance of evidence on affirmative defenses); PA. STAT. ANN. tit. 18, § 313(b) (1973) (defendant must prove by a preponderance of evidence "that his conduct occurred in response to an entrapment"); Act 9, ch. 2, § 237, 1972 Hawaii Sess. Laws 51 (entrapment as an affirmative defense); *id.* § 115(2)(b) at 40 (defendant has burden of persuasion by preponderance of evidence on affirmative defenses). *But see* TEX. CODES ANN. § 8.06(a) (1975) (entrapment is "a defense"); *id.* § 2.03 (after a "defense" has been raised state has burden of persuasion beyond a reasonable doubt); UTAH CODE ANNOT. § 76-2-303 (Supp. 1975) (entrapment is "a defense"); *id.* §§ 76-1-501, 76-1-502 (after "a defense" has been raised state has burden of persuasion beyond a reasonable doubt). However, the Utah supreme court has viewed its statute as a codification of the subjective approach, despite the fact that the statute is based on the Model Penal Code; and it is not clear that the Texas statute will be construed to establish a hypothetical-person defense. See note 16 *supra*.

336. MODEL PENAL CODE § 2.10, Comment at 21 (Tent. Draft No. 9, 1959).

conduct—would it be wise to argue that the burden should be on the defendant because the defense does not really “excuse” his conduct and because the defendant is placed in the position of a “plaintiff”?

Since the nature of the inducement offered is dispositive under the hypothetical-person approach, there are good practical reasons for placing the burden of persuasion on the government. The government has a better opportunity to develop reliable evidence about the nature of the inducement offered to the defendant. Both parties have access to this evidence, which usually concerns private conversations between the defendant and a government agent, but only the government knows that the evidence will be put to courtroom use. It can therefore take measures designed to make sure that its version of the conversations are believable. Although the informer system often requires the government to use agents of limited credibility, it can sometimes take the precaution of secretly recording the conversations or of having the informer bring along an undercover officer.³³⁷ At the very least, government witnesses are in a better position to recall the content of the conversations, since they know they may be required to testify about them.³³⁸

The real basis for placing the burden of persuasion on the defendant may lie in an unspoken feeling that entrapment is a disfavored defense (since it allows guilty persons to go free) or that the substantive definition of entrapment under the hypothetical-person defense is so lenient that defendants should be procedurally handicapped. Whatever the validity of these feelings in cases involving habitual offenders, the effect of the rule is to place an additional obstacle in the path of the nondisposed defendant.

337. See TIFFANY, *supra* note 13, at 256 (narcotics informers are sometimes supplied with miniature radio or other electronic device to transmit conversations to police); Wall St. J., Sept. 22, 1975, at 7, col. 2 (prostitution decoys reported to carry hidden microphones).

338. Sometimes the government will be reluctant to permit the informer to testify, since revealing his identity may compromise future undercover work or place him in physical jeopardy. However, if the defendant has raised the issue of entrapment and satisfied his burden of production by showing that the government initiated the criminal transaction, he has shown that he knows the informer to be an informer (though he may not know the informer's true name), and any further governmental interest could be protected by closed hearings and by sustaining objections to questions about the informer's name and address. Cf. *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir. 1975) (trial court did not err in excluding public from trial in order to protect identity of undercover agent).

There are also sound reasons for placing the burden of persuasion on the government when, as under the federal test, predisposition is a dispositive fact. Although the defendant has access to evidence about his own predisposition, the government is often in a better position to offer reliable evidence. The degree of pressure applied by the government agent is relevant to the determination of whether the defendant was predisposed, and, as I have already suggested, the government can more easily obtain and preserve evidence about the nature of its inducement. Moreover, even the most upright defendant may not be able to offer any evidence about his lack of propensity for crime other than his own testimony and testimony of friends about his character. If the defendant was in fact predisposed, the government should be able to offer convincing evidence—for example, testimony about the defendant's possession of criminal paraphernalia, his prior criminal activities, his oral admissions to undercover agents, or his ready acquiescence to an agent's suggestion of criminal activity. It is reasonable to ask the government to persuade the fact-finder with evidence of this nature when it seeks to convict for an offense committed at the suggestion of a government agent. There is no reason to believe that placing the burden of persuasion on the government has led to an excessive number of acquittals. In fact, the available evidence indicates that the entrapment defense rarely leads to acquittal.³³⁹

339. See Hardy, *The Traps of Entrapment*, 3 AM. J. CRIM. L. 165, 188-90 (1974) (defense counsel interviewed by author indicated the defense was rarely successful); Comment, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. CHI. L. REV. 137, 150 (1963) (similar results from interviews with police and prosecutors); cf. TIFFANY, *supra* note 13, at 287. Attorneys in the Minneapolis-St. Paul area have expressed similar views. In summer 1974, the author and two student research assistants interviewed nine lawyers (five defense attorneys and four prosecutors) in the area. With the exception of one prosecutor in a supervisory position, the lawyers were chosen because they were reputed to have handled large numbers of drug cases. The interviewees all agreed that the entrapment defense rarely resulted in acquittal. Some called it "weak" or "theoretical."

The defense attorneys had cumulatively handled 650-700 drug cases in 70 years of practice. Of these, 50 to 55 were tried to verdict on not guilty pleas. The entrapment defense was raised in five of their cases and failed in each.

The three trial prosecutors had tried an estimated 20 to 25 drug cases to verdict in 15 years of practice. The entrapment defense had been raised in one of their cases, where it failed.

The supervisory prosecutor reported that the entrapment defense had little impact on trials or on plea bargaining, but that his office sometimes screened out cases prior to initiating prosecution because informers had used improper tactics. He estimated that the entrapment defense

B. FUNCTION OF JUDGE AND JURY

Courts following the subjective approach have generally treated the entrapment defense as a jury issue.³⁴⁰ This approach is consistent with the view that the primary purpose of the subjective approach is acquittal of "innocent" (nondisposed) persons, since questions of the guilt or innocence of a particular defendant have traditionally been issues for the jury.

Supporters of the hypothetical-person approach have argued that the defense should be submitted to the judge,³⁴¹ saying that "preservation of the purity of its own temple belongs only to the court,"³⁴² and that only judicial opinions, "through the gradual evolution of explicit standards in accumulated precedents," can "give significant guidance for official conduct for the future."³⁴³

had resulted in acquittal in five to 10 of approximately 700 criminal cases which had been tried to verdict by his office in the previous 10 years.

See also Wall St. J., Sept. 22, 1975, at 1, col. 1:

There are no statistics on the frequency of the use of the entrapment defense, but Jerry Newton, an assistant U.S. attorney in Los Angeles, says that out of the hundreds of trials in Southern California involving narcotics traffic, the entrapment defense is used in fewer than 5% of cases. The government will get convictions in all but one or two of those, he says.

340. The majority opinions in *Sorrells*, *Sherman*, and *Russell* all held that the issue was for the jury. State courts have usually followed suit. See generally Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U. SAN FRAN. L. REV. 243, 268-71 (1963). However, Minnesota has endorsed the subjective approach while permitting the defendant to choose whether the issue will be determined by the judge or the jury. See *State v. Grilli*, 230 N.W.2d 445 (Minn. 1975).

341. In their minority opinions in *Sorrells*, *Sherman*, and *Russell*, Justices Roberts, Frankfurter, and Stewart argued that the issue should be decided by the trial judge. The Model Penal Code specifically provides for judicial determination, MODEL PENAL CODE § 2.13(2) (Official Draft, 1962), as did the leading case of *Grossman v. State*, 457 P.2d 226, 230 (Alas. 1969). The Brown Commission proposal takes no position, on grounds that the Commission's mandate did not extend to procedural proposals, see BROWN COMMISSION COMMENTARY, *supra* note 13, at 305, but Professor Starrs, the author of the commentary, expressed a preference for judicial determination. *Id.* at 325.

Unlike many supporters of the hypothetical-person test, the Iowa supreme court has expressed the view that the issue of entrapment should be submitted to the jury. See *State v. Mullen*, 216 N.W.2d 375, 382 (Iowa 1974). Moreover, statutes based upon the Model Penal Code have usually omitted its judge-trial provision. See statutes cited in note 16 *supra*.

342. *Sorrells v. United States*, 287 U.S. 435, 457 (1932) (minority opinion of Roberts, J.).

343. *Sherman v. United States*, 356 U.S. 369, 385 (1958) (Frankfurter, J., concurring).

To a large extent the validity of this dichotomy depends upon the resolution of other issues. For example, the assignment of the issue to the jury under the subjective approach seems sound only if reputation and other hearsay evidence is excluded. If such evidence is not excluded, the defendant should have the option of trying his entrapment defense before the judge, who is normally better qualified to give such evidence its proper weight.³⁴⁴

Similarly, the theory that the issue should be relegated to the judge under the hypothetical-person approach depends upon the soundness of its assumption that judges can set detailed rules of conduct for police agents. If this assumption is correct, then the defense should be the province of the court. The trial judge is in a better position to take a long-term view based upon the goals of the criminal justice system. Moreover, his application of law to fact can be set forth in a memorandum opinion, subject to judicial review, rather than being buried in a general verdict.

However, there is substantial doubt that courts can establish detailed rules of conduct.³⁴⁵ If the standard remains a vague one—such as whether the agent's conduct would have created a substantial risk that a nondisposed person would commit the offense—there is much to be said for submitting the issue to the jury. The jury's collective experience should make it competent to evaluate how a normally law-abiding person would have reacted to the agent's inducement. Moreover, the jury can perform the function of ameliorating the strictness of the law by making it conform to community mores. In other contexts the exercise of the jury's ameliorative function may be arbitrary and sporadic, since to perform that function the jury usually must disregard the judge's instructions. Some jurors will feel conscience-bound to follow the instructions, even if they believe the law to be unjust. However, no such objection is applicable to entrapment cases since the jury can follow the instruction to consider how a law-abiding person would have reacted to the agent's inducement, yet determine that the crime was such a petty or frequently committed one that this hypothetical person might commit it with very little prodding.

344. Cf. *State v. Grilli*, 230 N.W.2d 445, 455 (Minn. 1975) (permitting the defendant to choose between having the entrapment defense determined by the judge in a pretrial hearing or submitting it to the jury at trial).

345. See text accompanying notes 210-17 *supra*.

Assignment of the entrapment defense to the jury in hypothetical-person jurisdictions will help prevent the fact-finder from being exposed to predisposition evidence which has no substantial bearing on the propriety of the inducement offered.³⁴⁶ A trial judge sitting with a jury can hold a *voir dire* hearing to determine whether the evidence is sufficiently probative on the issue of police conduct to justify incurring the risk that the jury will use it for a forbidden purpose. If the determination goes against the admissibility of the evidence, the jury need never know that it existed. If the issue is tried before a judge, such evidence may have a prejudicial effect, since the judge must hear it to rule on its admissibility. Moreover, in cases in which the trial judge admits the evidence, the generous presumption that the judge based his decision only on admissible evidence (even when he erroneously admitted other evidence) may impede the development of appellate doctrine governing the admission or exclusion of predisposition evidence.³⁴⁷

IV. SUMMARY AND CONCLUSION

The principal goal of the hypothetical-person defense is to control the conduct of police and informers. There are many reasons to doubt that it can succeed in doing so. Because of the nature of undercover work, courts will probably never develop a set of rules simple yet specific enough to provide clear guidance to police agents. Standardized procedures cannot govern the sundry and unpredictable events that occur during encounters between target and temptor. Moreover, even if such procedures could be formulated and somehow taught to the army of addicts and criminals used by police to set up controlled offenses, it is doubtful that they would be followed—particularly since the rules would inevitably become known to targets as well as police agents.

The doubtful preventive effect of the hypothetical-person defense would be purchased at a price. The defense creates a risk

346. It is probable that jurisdictions following the hypothetical-person approach will find it necessary to admit evidence of the defendant's predisposition in circumstances in which it has a strong bearing upon the propriety of police conduct. See text accompanying notes 128-55 *supra*.

347. See *Altom v. United States*, 454 F.2d 289, 296 (7th Cir. 1971); *Thompson v. Baltimore & O.R.R.*, 155 F.2d 767, 771 (8th Cir.), *cert. denied*, 329 U.S. 762 (1946); C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 60 (2d ed. 1972) (judge will be presumed to have ignored inadmissible evidence admitted over objection).

that dangerous chronic offenders will be acquitted because they were offered inducements that might have tempted a hypothetical law-abiding person. More subtly, it creates a danger that persons will be convicted who do not deserve punishment. This danger stems from its attempts to evaluate the quality of government conduct without considering the defendant's culpability. The notion that sauce for the wolf is sauce for the lamb leads to unhappy consequences, since the sauce will be brewed with wolves in mind. Because many targets are professional criminals, judges will be reluctant to rule that entrapment has occurred simply because an agent found it necessary to appeal to friendship, make multiple requests, or offer a substantial profit. Yet approval of such conduct would lead to unfair results in cases where the target was law-abiding but ductile. For example, conviction of someone who has been solicited by a friend may be fair enough in the general run of cases, but unfair if the target was a nondisposed person who would not have committed the type of crime charged but for a request from that particular friend.

The danger of acquitting wolves and convicting lambs would be ameliorated if courts following the hypothetical-person test allow predisposition evidence to be introduced for its bearing on the propriety of the agent's inducement. The degree of persistence permitted would then depend upon whether the agent had sound reasons to believe that his target was already engaged in criminal enterprise. However, this approach would create even greater uncertainty about the boundaries of permissible inducement and further limit the defense's utility as a guide to police conduct. Moreover, so long as evidence about the target's propensity for crime is admitted only insofar as it bears on the propriety of the agent's inducement, highly probative evidence bearing on culpability will be excluded. For example, facts about the target which were not known to the agent at the time of inducement would be excluded.

The federal defense has the virtue of focusing upon the culpability of the defendant. It attempts to distinguish between persons who are blameworthy and persons who are not. In the absence of extraordinary circumstances, that should be the goal of our law of crimes.

This focus upon culpability is not inconsistent with the rule limiting the entrapment defense to persons who have been seduced by government agents. Admittedly, a defendant is no more blameworthy if his seducer turns out to be a private temp-

tor rather than a government agent. However, permitting the acquittal of defendants who have been led astray by private temptors would create too great a danger of contrived defenses. Moreover, the distinction between private temptors and government agents can be supported on the theory that none of the principal rationales of the entrapment defense (diminished culpability, deterrence of misconduct, respect for courts, protection against discriminatory law enforcement) alone justifies acquitting a defendant who intentionally committed a criminal act, but that when more than one rationale is served an acquittal is justified.

The greatest fault of federal entrapment doctrine lies in the permissiveness of its ancillary rules of evidence. Suspicion, rumor, second-hand reputation evidence, and other testimony which would normally be barred by the hearsay rule has been welcomed by some courts. This indiscriminate attitude toward predisposition evidence is by no means a necessary feature of the subjective test. If the accused was already engaged in a course of criminal conduct, the prosecution should be able to develop an arsenal of reliable predisposition evidence. If it cannot, the danger of wrongful acquittal is outweighed by the danger of convicting a person whose only real vice is a bad reputation. Reputation and other hearsay evidence should not become admissible merely because the accused has raised the defense of entrapment.

If construed to exclude such testimony, the subjective defense should present more reliable evidence to the fact-finder than the hypothetical-person defense. The latter focuses upon the nature of the inducement offered; consequently, trials are likely to be reduced to a swearing match between unreliable witnesses about words said in private. Under the subjective approach, the nature of the inducement offered is relevant to the question whether the defendant was a strayed lamb or an ensnared wolf, but so are a number of other facts susceptible to more reliable proof—including similar crimes by the defendant, the defendant's admissions to police officers, his access to contraband, and his possession of criminal paraphernalia. The admissibility of such evidence is a double-edged sword. The prosecution can rebut an entrapment defense very effectively by producing it. However, if the prosecution fails to produce the evidence, the defendant can argue that it has not satisfied its burden of persuasion since, despite its opportunity to do so, it has failed to bring forward evidence of predisposition aside from the testimony of its informer.

The nondisposed defendant will be doubly handicapped in jurisdictions that have followed the Model Penal Code or the Brown Commission proposal and placed the burden of persuasion on the defendant. The defendant must convince the fact-finder that the government used an overreaching inducement, despite the fact that (unlike the government) he did not know at the time of inducement that he would be charged with the crime, and hence had no occasion to preserve evidence on this point. A nondisposed defendant has a better chance under the subjective approach, which requires the government to prove predisposition beyond a reasonable doubt.

The danger of convicting nondisposed defendants could be reduced by using the hypothetical-person defense as a supplement to the subjective defense instead of as a substitute for it. There is nothing logically inconsistent about a double-barrelled defense which would excuse a defendant if (1) the agent used inducements likely to tempt a hypothetical law-abiding person, or (2) the defendant himself was not ready and willing to commit the crime.

A multifaceted entrapment defense of this nature would not be appropriate in cases involving major crimes. Defendants charged with large-scale trafficking in illegal drugs, counterfeiting, official corruption, or other serious crimes should not be excused if they were ready, willing, and able to commit the crime. The chance of meaningful control of agent misconduct is not great enough to justify exonerating persons guilty of these crimes.

In cases involving minor vice crimes, the acquittal of guilty defendants does not seem to be a great price to pay for the possibility of controlling intrusive police conduct. However, even in such cases, a multifaceted entrapment defense is not the most desirable legislative response. If investigation of minor vice crimes has led to offensive police conduct, a better response would be to reduce criminal penalties until police no longer view extensive undercover investigation as worthwhile. The creation of a special entrapment defense applicable only to certain offenses would lead to confusion about the content of the defense, and to discrimination between similarly situated defendants on the basis of police conduct having nothing to do with an accused person's culpability.

Entrapment is an aspect of the broader problem of controlling the activities of secret police in America. There is good rea-

son for concern about these activities, which have on occasion included use of agents provocateur, illegal surveillance, misuse of information gathered by police spying, and other serious abuses. However, the creation of new criminal defenses is not a very effective means of control. There are more desirable alternatives, including legislative investigation, special prosecutors, and creation of bodies such as the Knapp Commission. Governmental bodies with the power to investigate, subpoena witnesses, publicize abuses, recommend discipline, and institute prosecution are likely to be more effective than attempts at control through sporadic acquittal of criminal defendants. Legislative reform should be directed toward institutionalizing such mechanisms of control, rather than toward creating new defenses which allow guilty defendants to seek acquittals on grounds that they have been victims of overreaching police conduct.

Legislatures and courts have understandably been reluctant to endorse a multifaceted entrapment defense. The entrapment controversy has centered around which of the two standard-model formulations of the defense should be adopted. A majority of jurisdictions have properly chosen the subjective approach of the federal courts. In doing so they have not entirely relinquished the power to condemn egregious police misconduct. The subjective defense does not preclude acquittal in extraordinary circumstances in which the need to punish police misconduct or preserve respect for the law is clearly worth the acquittal of a guilty person. If the inducement offered was outrageous, then the due process clause would preclude conviction regardless of the defendant's predisposition. In other situations, the need to protect nondisposed defendants and punish chronic offenders justifies foregoing the possible preventive effects of the hypothetical-person defense.